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RATE REGULATION AS AFFECTED BY THE DISTRIBUTION OF GOVERNMENTAL POWERS IN THE CONSTITUTIONS.*

INTRODUCTORY.

In this article an effort will be made to show that, within their respective jurisdictions and within constitutional bounds, both Congress and the state legislatures may limit the charges for railroad transportation, either specifically or by definite general rules; and that if the legislative department of government establishes such rules it may empower a commission to name specific rates in accordance therewith; but that, on the other hand, such rules may be established only by the legislative department, and until they are so established no commission may constitutionally ordain specific rates. We shall, furthermore, consider the question whether the statutes which empower commissions to name specific rates do establish definite principles of which the commissions are simply called upon to state the specific applications or whether by those statutes the at-

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tempt is made to entrust to the commissions a discretion which is so broad as to be unconstitutional.

As the rules of constitutional law which are involved have been frequently misunderstood even by the courts which have endeavored to apply them, it will be necessary to examine at some length those rules and the more important cases which have arisen under them.

General Rule as to Distribution of Powers.

The United States and the several states have by their respective constitutions made partial[1] distributions of the powers of those governments among three departments of government. In so doing they have by implication, and at times by express words, declared that an organ possessing the characteristics of one department shall not exercise powers which have been entrusted only to another department.[2] It is this restraint which we shall consider in the present article.

Obviously, the distributive clauses of the federal Consti-

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[1] See page 4, *infra.*

[2] Cooley, Constitutional Limitations, 7th ed., 126; Cooley, Constitutional Law, 3d ed., 46; Black, Constitutional Law, 2d ed., pp. 78-84; Bondy, The Separation of Governmental Powers, (Columbia University Studies) 19-22; 6 A. & E. Enc. of L., 2d ed., 1006, 1009; 8 Cyc. 807, 828, 844, 858; *State* v. *Johnson,* (1900) 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662; *Western U. T. Co.* v. *Myatt,* (1899) 98 Fed. 335; *Shephard* v. *City of Wheeling,* (1887) 30 W. Va. 479, 4 S. E. 635. Compare 6 A. & E. Enc. of L., 2d ed., 1007; *State* v. *Bates,* (1905) 96 Minn. 110, 116, 104 N. W. 709, 712; *Sawyer* v. *Dooley,* (1893) 21 Nev. 390, 32 Pac. 437; and authorities cited in note 6, *infra;* and see *Atlantic E. Co.* v. *Wilmington & W. R. Co.,* (1892) 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393. Professor Dunning, in 19 Pol. Sci. Quar. 487, claims that Aristotle did not express the views concerning the distribution of governmental powers which later writers have attributed to him.—The statement in the text is obviously true as to those constitutions which contain express declarations to that effect. As to those which do not contain such declarations, it is clear that one department cannot exercise power which has been entrusted only to another department without the consent of the latter. And the question whether even the consent of the latter can validate the exercise of a power otherwise than as provided in the constitution must be answered by a consideration of the purpose of those who adopted the constitutions when they decided to grant different governmental powers to different organs of government.

tution relate only to the federal government,[3] and the distributive clauses of the state constitutions relate only to the governments of the respective states. Yet whether we consider the power of an organ of the federal government or the power of an organ of a state government, the problems involved will be the same, for there is a general uniformity among the constitutions, although, of course, there are also variations among the constitutions which may prevent uniform answers to those problems, and even under similar provisions different conclusions may be reached by the authorities of different jurisdictions.[4]

It is true that the actual distribution of powers is not strictly logical; that, for instance, the president or governor exercises power which is legislative in its character when he vetoes legislation, and legislative bodies exercise power of a judicial nature when they try cases of impeachment and power of an administrative nature when they consider appointments to office.[5] But such constitutional exceptions,

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[3] The United States Supreme Court said in *Satterlee* v. *Matthewson*, (1829) 2 Pet. 380, 413, "There is nothing in the Constitution of the United States which forbids the legislature of a state to exercise judicial functions." See also *Calder* v. *Bull*, (1798) 3 Dall. 386; *Randall* v. *Kreiger*, (1874) 23 Wall. 137, 147; *Consolidated R. Co.* v. *State*, (1908) 207 U. S. 541, 552, 28 Sup. Ct. 178, 181; *Michigan C. R. Co.* v. *Powers*, (1906) 201 U. S. 245, 294, 26 Sup. Ct. 459, 462, 463; *League* v. *Texas*, (1902) 184 U. S. 156, 161, 22 Sup. Ct. 475, 477; *Winchester & S. R. Co.* v. *Commonwealth*, (1906) 106 Va. 264, 267, 269, 55 S. E. 692, 693, 694; Bondy, The Separation of Governmental Powers, (Columbia University Studies) 21; *Mobile, J. & K. C. R. Co.* v. *State*, (1908) 210 U. S. 187, 202, 28 Sup. Ct. 650, 655; *Claiborne Co.* v. *Brooks*, (1884) 111 U. S. 400, 410, 4 Sup. Ct. 489, 494. The dates of the cases will be noted, however.

[4] *Trustees* v. *Saratoga G., E. L. & P. Co.*, (1908) 191 N. Y. 123, 83 N. E. 693, 696; *People* v. *Cook*, (1907) 147 Mich. 127, 131, 132, 110 N. W. 514, 516; *State* v. *Kline*, (1907) Ore., 93 Pac. 237, 239; *Winchester & S. R. Co.* v. *Commonwealth*, (1906) 106 Va. 264, 55 S. E. 692; *Wheeler's Appeal*, (1877) 45 Conn. 306; McGehee, Due Process of Law, 71; Goodnow, The Principles of the Administrative Law of the United States, 33, 95; and see remarks of Christiancy, J., in *People* v. *Hurlburt*, (1874) 24 Mich. 44, 63.

[5] On the power of a legislature to appoint its own subordinate officers and to conduct investigations—which are not acts of a legislative nature, and on the power of a court to appoint its own subordinate officers and to exercise analogous powers—which are not acts of a judicial nature, see the discussion in *Board of Comrs.* v. *Gwin*, (1894) 136 Ind. 562,

and even exceptions, which appear in some constitutions, which directly affect rate regulation, do not lessen the positiveness of the rule in unexcepted cases.

It is, however, important that we notice that the distribution of powers is not complete, so that while some powers may be exercised only by the legislature, others only by an administrative organ, and still others only by the courts, there are also powers which are not definitely assigned by the constitutions and which may, therefore, be exercised by the legislature itself or be assigned by it to one of the other departments.[6] Moreover, the legislature may grant some self-government to the localities.[7] In so doing it is not

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36 N. E. 237; Goodnow, The Principles of the Administrative Law of the United States, 37, 41, 446-448; Bondy, The Separation of Governmental Powers, (Columbia University Studies) 34, 70, 76, 84, 114, 115, 122, 138; Black, Constitutional Law, 2d ed., p. 76; *In re Janitor of Supreme Court,* (1874) 35 Wis. 410; *In re Chapman,* (1897) 166 U. S. 661, 17 Sup. Ct. 677; *State* v. *Pierre,* (1908) 121 La., 46 So. 574. And see 6 A. & E. Enc. of L., 2d ed., 1007; 21 Harv. L. Rev. 161. Compare the authorities cited in note 22, *infra.* The actual decision in *Kilbourn* v. *Thompson,* (1880) 103 U. S. 168, was simply that the federal House of Representatives did not have authority to make the particular investigation there considered.

[6] See Cooley, Constitutional Law, 3d ed., 45, 46; Bondy, The Separation of Governmental Powers, (Columbia University Studies) 79, 80; Stevens, Sources of the Constitution of the United States, 49; *Toncray* v. *Budge,* (1908) Idaho, 95 Pac. 26; *Incorporated Village of Fairview* v. *Giffee,* (1905) 73 Ohio St. 183, 76 N. E. 865; *State* v. *Struble,* (1905) 19 S. D. 646, 104 N. W. 465; *State* v. *Bates,* (1905) 96 Minn. 110, 104 N. W. 709; *Paul* v. *Gloucester County,* (1888) 50 N. J. L. 585, 611, 15 Atl. 272, 284; *Brown v. Turner,* (1874) 70 N. C. 93, 102; 6 A. & E. Enc. of L., 2d ed., 1007; *Ross* v. *Whitman,* (1856) 6 Cal. 361; *Opinion of Justices,* (1885) 138 Mass. 601; page 10, *infra,* and note 66, *infra.* And there are powers which other organs may exercise until forbidden by the legislature: see, *e. g.,* 8 A. & E. Enc. of L., 2d ed., 29, 30; compare note 22, *infra.*

[7] Cooley, Constitutional Limitations, 7th ed., 165, 172, 263, 264; 8 Cyc. 837; 6 A. & E. Enc. of L., 2d ed., 1027, 1024; 28 *id.* 160; Dillon, Municipal Corporations, 4th ed., sec. 308; Goodnow, The Principles of the Administrative Law of the United States, 37; and see Oberholtzer, The Referendum in America, 324, 332, 334; Sutherland, Statutory Construction, 2d ed., p. 170. Compare *Elliott* v. *City of Detroit,* (1899) 121 Mich. 611, 84 N. W. 820; *In re Municipal Suffrage to Women,* (1894) 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113; *Bradshaw* v. *Lankford,* (1891) 73 Md. 428, 21 Atl. 66, 11 L. R. A. 582; *Slinger* v. *Henneman,* (1875) 38 Wis. 504; *Burton* v. *Dupree,* (1898) 19 Tex. Civ. App. 275, 46 S. W. 272. Congress may grant local, but only local, powers to the

reassigning power which has been entrusted exclusively to itself, for such limited power has been constantly granted to local authorities from time immemorial, and the general language of the constitutions is interpreted in accordance with this custom, since contemporary history does not furnish any reason for thinking that those who adopted the constitutions intended to abolish the custom. And, of course, the fact that a constitution assigns a given power to one organ of the central government does not of itself oblige the legislature when it bestows a similar power over strictly local matters upon an organ of local government to bestow it upon a similar organ.[8]

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territories: see *Stoutenburgh* v. *Hennick,* (1899) 129 U. S. 141, 9 Sup. Ct. 256; and also *McCornick* v. *Western U. T. Co.,* (1897) 79 Fed. 449, 451; *Ansley* v. *Ainsworth,* (1902) 4 Ind. Ter. 308, 69 S. W. 884. It seems that there would be less "refinement of reasoning" (see *In re Rahrer,* (1891) 140 U. S. 545, 562, 11 Sup. Ct. 865, 869) in sustaining local option and similar laws upon the ground given in the text than in sustaining them upon the ground which is usually given: *Paul* v. *Gloucester County,* (1888) 50 N. J. L. 585, 594, 600, 603, 604, 15 Atl. 272, 276, 279, 280; and see Oberholtzer, The Referendum in America, 208-217, 324; Cooley, Constitutional Limitations, 7th ed., 168, 169. Compare *Field* v. *Clark,* (1892) 143 U. S. 649, 694, 12 Sup. Ct. 495, 505; Sutherland, Statutory Construction, 2d ed., p. 173; Oberholtzer, *op. cit.,* 324, 328; *Evers* v. *Hudson,* (1907) Mont., 92 Pac. 462, 466, 467; *Fouts* v. *Hood River,* (1905) 46 Ore. 492, 81 Pac. 370, 1 L. R. A. N. S. 483; *McGonnell's License,* (1904) 209 Pa. 327, 58 Atl. 615; *Locke's Appeal,* (1873) 72 Pa. St. 491, 508. On the other hand, it is submitted that delegations of power to state boards cannot properly be based upon this exception to the general rule, however defensible they may sometimes be upon another ground. Consider *Brodbine* v. *Revere,* (1903) 182 Mass. 598, 66 N. E. 607; *People* v. *Harper,* (1878) 91 Ill. 357, 370; *Pierce* v. *Doolittle,* (1906) 130 Iowa, 333, 336, 106 N. W. 751, 752, 6 L. R. A. N. S. 143, 145; *Tilley* v. *Savannah, F. & W. R. Co.,* (1881) 5 Fed. 641, 657; 19 Harv. L. Rev. 203; 20 Harv. L. Rev. 147.

[8] *People* v. *Provines,* (1868) 34 Cal. 520, 532; *Eckerson* v. *City of Des Moines,* (1908) Iowa, 115 N. W. 177, 182; *Staude* v. *Board of Election Comrs.,* (1882) 61 Cal. 313, 322; see also *Commonwealth* v. *Collier,* (1905) 213 Pa. 138, 62 Atl. 567; *Muhlenberg Co.* v. *Morehead,* (1898) 20 Ky. L. Rep. 376, 46 S. W. 484; *Pennington* v. *Woolfolk,* (1880) 79 Ky. 13; *Terre Haute* v. *Evansville & T. H. R. Co.,* (1897) 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; *Fox* v. *McDonald,* (1893) 101 Ala. 51, 69, 13 So. 416, 419; Bondy, The Separation of Governmental Powers, (Columbia University Studies) 179, 183; Goodnow, The Principles of the Administrative Law of the United States, 35-37; and cases there cited. Compare *State* v. *Armstrong,* (1907) Miss., 44 So. 809; *Mayor* v. *Dechert,* (1870) 32 Md. 369; and also *Trustees* v. *Saratoga G., E. L. & P. Co.,* (1908) 191 N. Y. 123, 83 N. E. 693, 696.

Extent of Power of Legislature.

At the time of the American Revolution the British Parliament had absolute power over the persons and political institutions under British control, subject only to a veto power.[9] By the Revolution the state legislatures acquired similar power over the persons and political institutions of their states, subject to gubernatorial veto, although constitutions soon limited their powers and placed some powers in the hands of other governmental organs beyond the reach of legislative exercise or control.[10] And while Congress can deal only with subject-matters entrusted to it,[11]

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[9] See Blackstone, Commentaries, I, *91, *160-*162; *Lee* v. *Bude & T. J. Ry. Co.*, (1871) L. R. 6 C. P. 576, 582; Courtney, The Working Constitution of the United Kingdom, 4; Dicey, The Law of the Constitution, 6th ed., 58 *et seq.*; *Hurtado* v. *People*, (1884) 110 U. S. 516, 531, 4 Sup. Ct. 111, 292, 119; *Slaughter House Cases*, (1872) 16 Wall. 36, 65. That veto power has not been exercised since 1707: Anson, The Law and Custom of the Constitution, 3d ed., I, 301.

[10] "The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law power is elsewhere reposed:" *McPherson* v. *Blacker*, (1892) 146 U. S. 1, 25, 13 Sup. Ct. 3, 7. See also *Northwestern N. L. I. Co.* v. *Riggs*, (1906) 203 U. S. 243, 253, 27 Sup. Ct. 126, 128; Sutherland, Statutory Construction, 2d ed., sec. 81; Patterson, The United States and the States Under the Constitution, 2d ed., p. 2; Cooley, Constitutional Limitations, 7th ed., 128, 233, 236, 241; 6 A. & E. Enc. of L., 2d ed., 934; 8 Cyc. 775; Black, Constitutional Law, 2d ed., pp. 63, 64; Sedgwick, Construction of Statutory and Constitutional Law, 2d ed., 154; Goodnow, The Principles of the Administrative Law of the United States, 40; 7 Harv. L. Rev. 422; 32 Am. L. Reg. N. S. 1093, 1097; *Dorman* v. *State*, (1859) 34 Ala. 216; *Thorpe* v. *Rutland & B. R. Co.*, (1854) 27 Vt. 140; *Redell* v. *Moores*, (1901) 63 Neb. 219, 230, 231, 88 N. W. 243, 247, 55 L. R. A. 740, 744, 745; *State* v. *Missouri P. Ry. Co.*, (1907) Kan., 92 Pac. 606, 613; *Ratcliff* v. *Wichita U. S. Co.*, (1906) 74 Kan. 1, 16, 86 Pac. 150, 155; *State* v. *Fountain*, (1908) Del., 69 Atl. 926, 930; *Harder's F. S. & V. Co.* v. *Chicago*, (1908) Ill., 85 N. E. 245, 247; dissenting opinion in *Abbott* v. *Beddingfield*, (1899) 125 N. C. 256, 268, 272, 34 S. E. 412, 415, 416; 21 Harv. L. Rev. 383; Century and American Digests, Const. Law, II, B, Grant or limitation of power. On the effect of a grant of power to legislate see note 13, *infra*. With authorities in this note compare *State* v. *Moores*, (1898) 55 Neb. 480, 490, 76 N. W. 175, 177, 41 L. R. A. 624, 627, and authorities there cited (which case was overruled in *Redell* v. *Moores, supra*); 32 Am. L. Reg. N. S. 3, 784, 971, 1064; 13 Harv. L. Rev. 441; Report of Pennsylvania Bar Assn., VI, 251.

[11] *Hodges* v. *United States*, (1906) 203 U. S. 1, 16, 27 Sup. Ct. 6, 8;

except in regard to the territories,[12] as to such subject-matters its general power is the same as that of state legislatures over subject-matters not removed from their control,[13] though it also is under express restrictions and some governmental powers have been placed beyond its exercise or control. In other words, the state legislatures, over subject-matters not withdrawn from their control, and Congress, over subject-matters entrusted to it, have all governmental powers not entrusted by the constitutions to other organs of government and not withdrawn from the control of those legislative bodies by other provisions of the constitutions.

It is, therefore, clear that legislative bodies may determine the principles upon which railroad charges shall be based and may themselves ordain specific schedules of rates for future transportation, unless those powers, or either of them, have been entrusted exclusively to another organ of government by the constitutional provisions which assign judicial powers to the courts or by those which assign administrative powers to administrative organs, or unless the legislatures are restrained by other constitutional provisions which we need not here consider.

The question whether a legislature in making enactments of the character referred to would entrench upon the power

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United States v. *Harris,* (1883) 106 U. S. 629, 635, 1 Sup. Ct. 601, 606; *Kansas* v. *Colorado,* (1907) 206 U. S. 46, 81, 87, 88, 89, 92, 27 Sup. Ct. 655, 661, 663, 664, 665.

[12] *National Bank* v. *County of Yankton,* (1879) 101 U. S. 129; *Utter* v. *Franklin,* (1899) 172 U. S. 416, 423, 19 Sup. Ct. 183, 186; *Mormon Church* v. *United States,* (1890) 136 U. S. 1, 42, 43, 10 Sup. Ct. 792, 802, 803. See also *De Lima* v. *Bidwell,* (1901) 182 U. S. 1, 196, 21 Sup. Ct. 743, 753; *Shively* v. *Bowlby,* (1894) 152 U. S. 1, 48, 14 Sup. Ct. 548, 566; Patterson, The United States and the States Under the Constitution, 2d ed., pp. 8, 9.

[13] See Patterson, The United States and the States Under the Constitution, 2d ed., p. 17; *Juilliard* v. *Greenman,* (1884) 110 U. S. 421, 447-450, 4 Sup. Ct. 122, 129-131; *Burton* v. *United States,* (1906) 202 U. S. 344, 366, 367, 26 Sup. Ct. 688, 693; *Chinese Exclusion Case,* (1889) 130 U. S. 581, 603, 604, 9 Sup. Ct. 623, 629; *Gibbons* v. *Ogden,* (1824) 9 Wheat. 1, 196, 197; McMurtrie, Observations on Mr. George Bancroft's Plea for the Constitution, 24, 25.

of an administrative organ has apparently never arisen, and it is doubtful whether such a contention will ever be made. We must, however, consider the question whether legislative enactments of that character would entrench upon the power of the courts.

It is true that, in the absence of statute, the courts may, in cases properly before them, determine the amount which a common carrier may charge for services rendered by it.[14] But there is a clear distinction between applying an existing rule of law (in that case the common law) and adopting a new and possibly different rule of law for relations which may exist in the future.[15] The legislature, in regulating rates, is not deciding what the rights of parties are at the time the schedule is enacted. It is not interpreting the common law. It is adopting for the future a rule which supersedes that law.

And certainly the legislature may change the common law.[16] The only legal restrictions upon legislative action

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[14] *Stern* v. *Metropolitan T. & T. Co.*, (1897) 46 N. Y. Supp. 110, 19 N. Y. App. Div. 316; *Cook & Wheeler* v. *Chicago, R. I. & P. Ry. Co.*, (1890) 81 Iowa, 551, 46 N. W. 1080, 9 L. R. A. 764; *Menacho* v. *Ward*, (1886) 27 Fed. 529. Even without such decisions, it would seem to follow from the fact that a common carrier cannot refuse to carry: *Jackson* v. *Rogers*, (1683) 2 Show. 327, that the carrier cannot escape this duty by charging whatever it pleases.

[15] "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act:" *Interstate Com. Comn.* v. *Cincinnati, N. O. & T. P. Ry. Co.*, (1897) 167 U. S. 479, 499, 17 Sup. Ct. 896, 900. See also 167 U. S. 505, 17 Sup. Ct. 902; *McChord* v. *Louisville & N. R. Co.*, (1902) 183 U. S. 483, 495, 22 Sup. Ct. 165, 169; *State* v. *Johnson*, (1900) 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662; *Western U. T. Co.* v. *Myatt*, (1899) 98 Fed. 335; *Shephard* v. *City of Wheeling*, (1887) 30 W. Va. 479, 4 S. E. 635. Cases sustaining legislative regulation are cited in *Atlantic C. L. R. Co.* v. *North C. Corp. Comn.*, (1907) 206 U. S. 1, 19, 27 Sup. Ct. 585, 591.

[16] See *Munn* v. *Illinois*, (1876) 94 U. S. 113, 134; *West* v. *Louisiana*, (1904) 194 U. S. 258, 262, 24 Sup. Ct. 650, 652; *Dilworth* v. *Schuylkill I. L. Co.*, (1908) 219 Pa. 527, 530, 69 Atl. 47, 48; *Sutherland* v. *Governor*, (1874) 29 Mich. 320, 325, 326; Blackstone, Commentaries, I, *89; 6 A. & E. Enc. of L., 2d ed., 1034, 1035; and notes 9 and 10, *supra*. In *Reagan* v. *Farmers' L. & T. Co.*, (1894) 154 U. S. 362, 397, 14 Sup. Ct. 1047, 1054, the court, after saying correctly, "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the

are those imposed by the constitutions. If a principle of the common law has been inserted in the constitutions it is binding upon the legislatures not as a principle of the common law but as a provision of the constitutions. And the fact that courts enforce compliance with some constitutional provisions certainly does not show that rate regulation is judicial in its nature.[17]

Nor do the constitutional provisions now under consideration oblige the legislature to state merely general principles and leave to the courts the statement of the application of those principles to particular circumstances which may exist thereafter. The legislature may do so, unques-

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transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function," goes on to say, "Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limits of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates." This reference to the common law as furnishing a ground for judicial inquiry into the propriety of rates named by a governmental authority is clearly inappropriate. And the reason given for the decision in *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* (1890) 134 U. S. 418, 10 Sup. Ct. 462, 702, is likewise unsound. See Noyes, American Railroad Rates, 250; *Steenerson* v. *Great N. Ry. Co.,* (1897) 69 Minn. 353, 375, 72 N. W. 713, 716; *San Diego L. & T. Co.* v. *National City,* (1899) 174 U. S. 739, 754, 19 Sup. Ct. 804, 810.

[17] The court of last resort said in *Monongahela N. Co.* v. *United States,* (1893) 148 U. S. 312, 327, 13 Sup. Ct. 622, 626, that the amount of compensation to which the owner of property taken by the federal government is entitled is, in view of the just compensation provision of the Fifth Amendment, strictly a judicial question. It is submitted that this statement is incorrect and that in any event it is inapplicable to rate regulation. Conceding that if the owner be not given what the court considers just compensation the court may declare the taking unconstitutional, it certainly does not follow that the court may fix the amount of compensation in the first instance or may apply any but constitutional tests to the amount fixed. Indeed, the court also said in the same opinion that the decision of Congress is not conclusive, although without recognizing that this position is far different from the one already referred to. And even if the court had actually decided the case in accordance with its extremest language, we should still have many earlier and later declarations by the same court that the prescribing of future rates is a legislative or administrative act. See, *e. g., Chicago, M. & St. P. Ry. Co.* v. *Tompkins,* (1900) 176 U. S. 167, 173, 20 Sup. Ct. 336, 338, and notes 15, *supra,* and 41, 55 and 56, *infra.*

tionably, but it is not obliged to do so. The power of legislative bodies to enact detailed legislation, unless expressly forbidden by other provisions of the constitutions, is too well recognized to be open to dispute. If the legislature does not attempt to determine whether the conduct of individuals complies with regulations which it has laid down, it does not infringe upon any power which is bestowed exclusively upon the courts by the constitutional provisions which grant to them judicial power.

In addition to the regulative power which may be exercised only by the legislature[18] (except in so far as that body authorizes local self-government)[19] the legislature possesses powers which other organs of government may exercise but may not exercise exclusively: thus there are many administrative regulations which it may enact itself or the making of which it may entrust to administrative organs,[20] and it may, within limits which we need not here consider, make regulations concerning the internal organization and methods of operation of both administrative[21] and judicial[22] organs, or it may entrust that power to the organs concerned.[23]

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[18] See note 26, *infra.*

[19] See note 7, *supra.*

[20] See note 6, *supra,* and the discussion of delegation of power, *infra.*

[21] See Goodnow, The Principles of the Administrative Law of the United States, 123, 125.

[22] Brown on Jurisdiction, sec. 14; Wigmore on Evidence, secs. 7, 1353, 1354 ; Bondy, The Separation of Governmental Powers, (Columbia University Studies) 31, 100; *Banks* v. *State,* (1905) 124 Ga. 15, 52 S. E. 74; *State* v. *Barrett,* (1905) 138 N. C. 630, 50 S. E. 506, 1 L. R. A. N. S. 626; *In the Matter of the Estate of Stilwell,* (1893) 139 N. Y. 337, 34 N. E. 777; *Whiting* v. *Townsend,* (1881) 57 Cal. 515; *Cooper's Case,* (1860) 22 N. Y. 67, 90; note 5, *supra.* See also *State* v. *Pierre,* (1908) 121 La., 46 So. 574; *Memphis St. Ry. Co.* v. *Byrne,* (1907) Tenn., 104 S. W. 460, 470; *People* v. *Hayne,* (1890) 83 Cal. 111, 23 Pac. 1, 7 L. R. A. 348; *Brady* v. *Carteret R. Co.,* (1907) 70 N. J. E. 748, 67 Atl. 606. Compare *In re Day,* (1899) 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; *Herndon* v. *Imperial F. I. Co.,* (1892) 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547; *State* v. *Noble,* (1889) 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101; *Houston* v. *Williams,* (1859) 13 Cal. 24; *Calvert* v. *Carstarphen,* (1903) 133 N. C. 25, 45 S. E. 353; *Ex parte Griffiths,* (1889) 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398; Bondy, *op. cit.,* 168; and also *In re Janitor of Supreme Court,* (1874) 35 Wis. 410.

[23] *Wayman* v. *Southard,* (1825) 10 Wheat. 1, 42, 43, 46; *Bank of the*

Limited Power of Administrative Organs.

Administrative organs possess only the powers which have been entrusted to them by a constitution or by legislation.[24] Passing over clear grants of power by the constitutions with the remark that they may confer upon organs which are granted administrative power more than merely administrative power, and that in such cases decisions concerning merely administrative bodies may be inapplicable to such organs, and, conversely, decisions concerning them may be inapplicable to merely administrative organs, we shall inquire simply what portion of the power which may be exercised by the legislature may be granted by the legislature to administrative bodies without infringing the distribution of powers which is usually made by the constitutions.

Delegation of Power by Legislature.

The courts have frequently determined that, except with reference to local affairs,[25] a legislature may not delegate

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U. S. v. *Halstead,* (1825) 10 Wheat. 51, 61; *Hudson* v. *Parker,* (1895) 156 U. S. 277, 15 Sup. Ct. 450; *Cooke* v. *Avery,* (1893) 147 U. S. 375, 13 Sup. Ct. 340; *Stevens* v. *Truman,* (1899) 127 Cal. 155, 59 Pac. 397; *White* v. *Toledo, St. L. & K. C. R. Co.,* (1897) 79 Fed. 133; *Winston* v. *Stone,* (1897) 102 Ky. 423, 43 S. W. 397; *Anderson* v. *Levely,* (1882) 58 Md. 192; *Thompson* v. *Floyd,* (1855) 2 Jones' L. (N. C.) 313. See also *State* v. *Struble,* (1905) 19 S. D. 646, 104 N. W. 465; *Atlantic E. Co.* v. *Wilmington & W. R. Co.,* (1892) 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393; *Hildreth* v. *Crawford,* (1884) 65 Iowa, 339, 343; *Coleman* v. *Newby,* (1871) 7 Kan. 82; 8 Cyc. 835; note 6, *supra.*

[24] See *Interstate Com. Comn.* v. *Cincinnati, N. O. & T. P. Ry. Co.,* (1897) 167 U. S. 479, 17 Sup. Ct. 896; *Interstate Com. Comn.* v. *Alabama M. Ry. Co.,* (1897) 168 U. S. 144, 18 Sup. Ct. 45; *Board of R. Comrs.* v. *Oregon Ry. & Nav. Co.,* (1888) 17 Ore. 65, 19 Pac. 702, 2 L. R. A. 195; *United States* v. *Eaton,* (1892) 144 U. S. 677, 12 Sup. Ct. 764; *Morrill* v. *Jones,* (1883) 106 U. S. 466, 1 Sup. Ct. 423; 23 A. & E. Enc. of L., 2d ed., 653; Goodnow, The Principles of the Administrative Law of the United States, 46, 47, 95; *People* v. *Healy,* (1907) 231 Ill. 629, 83 N. E. 453.

[25] On the power of the legislature to allow localities to govern themselves in some respects, see note 7, *supra.* That administrative and judicial organs may be allowed to make regulations concerning their own internal organization and methods of operation (see note 23, *supra*) hardly seems to be an exception to the general rule.

its power of deciding questions of public policy,[26] and in this article the validity of that rule will be assumed.[27] On the other hand, although rate regulation may involve ques-

[26] In the following cases among others it has been actually decided that power which is strictly legislative may not be delegated, and there are dicta to that effect in many other cases: *Central of Ga. Ry. Co.* v. *Railroad Comn.*, (1908) 161 Fed. 925, 985 (where the statute dealt with rate-making by commission); *State* v. *Great N. Ry. Co.*, (1907) 100 Minn. 445, 111 N. W. 289; *Vallelly* v. *Board of Park Comrs.*, (1907) N. D., 111 N. W. 615; *United States* v. *Matthews*, (1906) 146 Fed. 306; *People* v. *Board of Election Comrs.*, (1906) 221 Ill. 9, 77 N. E. 321; *Rose* v. *State*, (1906) Ala., 40 So. 951; *Fite* v. *State*, (1905) 114 Tenn. 646, 88 S. W. 941, 1 L. R. A. N. S. 520; *State* v. *Budge*, (1905) 14 N. D. 532, 105 N. W. 724; *King* v. *Concordia F. I. Co.*, (1905) 140 Mich. 258, 103 N. W. 616; *Phoenix I. Co.* v. *Perkins*, (1905) 19 S. D. 59, 101 N. W. 1110; *State* v. *Rogers*, (1905) 71 Ohio St. 203, 73 N. E. 461; *Mitchell* v. *State*, (1902) 134 Ala. 392, 32 So. 687; *Gilhooly* v. *City of Elizabeth*, (1901) 66 N. J. L. 484, 49 Atl. 1106; *Noel* v. *People*, (1900) 187 Ill. 587, 58 N. E. 616; *Johnstown C. Assn.* v. *Parker*, (1899) 45 N. Y. App. Div. 55, 60 N. Y. Supp 1015; *Inhabitants of Township of Bernards* v. *Allen*, (1898) 61 N. J. L. 228, 39 Atl. 716; *In re Incorporation of North Milwaukee*, (1896) 93 Wis. 616, 67 N. W. 1033; *Dowling* v. *Lancashire I. Co.*, (1896) 92 Wis. 63, 65 N. W. 738; *Hovey* v. *Commissioners of Wyandotte Co.*, (1896) 56 Kan. 577, 44 Pac. 17; *Anderson* v. *Manchester F. A. Co.*, (1895) 59 Minn. 182, 191, 63 N. W. 241, 28 L. R. A. 609, 610; *O'Neil* v. *American F. I. Co.*, (1895) 166 Pa. 72, 30 Atl. 943, 26 L. R. A. 715; *State* v. *Gaster*, (1893) 45 La. An. 636, 12 So. 739; *Board of Harbor Comrs.* v. *Excelsior R. Co.*, (1891) 88 Cal. 491, 26 Pac. 375; *King* v. *Tennessee*, (1889) 87 Tenn. 304, 10 S. W. 509, 3 L. R. A. 210; *Ex parte Cox*, (1883) 63 Cal. 21; *Pilkey* v. *Gleason*, (1856) 1 Iowa, 522; *Barto* v. *Himrod*, (1853) 8 N. Y. 483; *State* v. *Field*, (1853) 17 Mo. 529. See also *Commonwealth* v. *Addams*, (1894) 95 Ky. 588, 26 S. W. 581; *State* v. *Gaunt*, (1885) 13 Ore. 115, 9 Pac. 55; *Kehler & Bro.* v. *Jack M. Co.*, (1876) 55 Ga. 639; and end of note 2, *supra*. But, of course, the fact that Locke (On Civil Government, sec. 142) declared broadly that a legislature may not transfer the power of making laws, while it may cast some light upon the intentions of those who long afterwards adopted the American constitutions, does not except for that purpose have any value whatever. Concerning Locke's book see also Stephen, Horae Sabbaticae, II, 155, 156.

[27] The rule can be based only upon the purpose of those who, in adopting the constitutions, distributed governmental powers. This purpose the courts have usually sought by reading the distributive clauses not in the light of political theories predominant when the constitutions were adopted but in the light of the common law principle that an agent may not delegate his powers, although the state legislatures, and apparently Congress, resemble Parliament more closely than they resemble mere agents. And, since the legislature may delegate some of its powers: see notes 6, 23, *supra*, and 29, 59, 69, *et seq.*, *infra*, the common law does not furnish a complete interpretation of the provisions.—The men who adopted the various constitutions were influenced by a theory which was based upon an appreciative generalization of governmental conditions which, as some of those who adopted

tions of public policy,[28] there are decisions that at least some specific rates named by commission are valid.[29]

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the constitutions realized, did not fully accord with that generalization; and in many of the constitutions it is not clear how closely those who adopted them intended that theory to be followed in interpreting general provisions. See The Federalist, Nos. 47 *et seq.;* Stevens, Sources of the Constitution of the United States, 41, 42, 47, 48, 49, 57, 154, 155, 177. With the exception of *Marr* v. *Enloe,* (1830) 1 Yerg. (Tenn.) 452, where that was one of the grounds of the decision, there seems to have been no case before 1847 in which legislation was actually declared unconstitutional upon the ground that legislative power was delegated. And since then the courts as a general rule certainly have not followed any theory consistently and intelligently. To an amazing extent the decisions are either based upon fictions or based upon cases which do not apply or the opinions do not notice distinctions which are admitted by all who consider such distinctions. In spite of frequent declarations by the courts that legislative power may not be delegated, such opinions and decisions cast some doubt upon the propriety of their ever declaring legislation unconstitutional upon the ground that a constitution impliedly forbids a delegation of legislative power: see 21 Harv. L. Rev. 206; Thayer, Life of Marshall, chap. 5. Yet if it is clear that the legislature may not delegate a power which another organ attempts to exercise, the courts have a stronger reason for declaring that exercise unconstitutional than they ordinarily have for declaring the action of another department of government invalid, for the right of courts to decide whether legislation has been passed by the body prescribed by the constitution is clearer than their right to decide whether legislation passed in the proper manner is constitutional: see language of Gibson, J., dissenting, in *Eakin* v. *Raub,* (1825) 12 S. & R. (Pa.) 330, 349, 354.—The court said in *Chicago & N. W. Ry. Co.* v. *Dey,* (1888) 35 Fed. 866, 874, 1 L. R. A. 744, 750, "After all, the question is one more of form than of substance. The vital question with both shipper and carrier is that the rates shall be just and reasonable, and not by what body they shall be put in force." To just as great an extent the question whether the President may order the punishment of a counterfeiter without trial is one "more of form than of substance." And so is the question whether in a common law suit in a federal court where the value in controversy exceeds twenty dollars the defendant may be denied a trial by jury. But the men who adopted some of our constitutions, at least, considered the forms of government important: see Pollock's Maine's Ancient Law, 175; Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 137, note.

[28] See pp. 40, 42, *infra.*

[29] *State* v. *Chicago, M. & St. P. Ry. Co.,* (1888) 38 Minn. 281, 37 N. W. 782; *Georgia R. & B. Co.* v. *Smith,* (1883) 70 Ga. 694; *Tilley* v. *Savannah, F. & W. R. Co.,* (1881) 5 Fed. 641; *McWhorter* v. *Pensacola & A. R. Co.,* (1888) 24 Fla. 417, 5 So. 129, 2 L. R. A. 504; *Storrs* v. *Pensacola & A. R Co.,* (1892) 29 Fla. 617, 11 So. 226; and see *Trustees* v. *Saratoga G., E. L. & P. Co.,* (1908) 191 N. Y. 123, 83 N. E. 693; *Stone* v. *Yazoo & M. V. R. Co.,* (1885) 62 Miss. 607, 645, 21 A. & E. R. Cas. 6, 16; *Stone* v. *Natchez, J. & C. R. Co.,* (1885) 62 Miss. 646, 21 A. & E. R. Cas. 17; *People* v. *Harper,* (1878) 91 Ill. 357; *Southern Ry. Co.* v. *Hunt,* (1908) Ind. App., 83 N. E. 721; *Chicago, I & L. Ry.*

Calling attention to these two lines of cases, it is submitted that the legislature is the only governmental body which may determine the principles upon which rates shall be regulated, and that while the legislature, when it names specific rates, need not disclose the principles upon which it acts or even consciously adopt any principles, that body may not grant to any other organ of government any power whatever to name specific rates for future transportation without first laying down principles sufficient for the guidance of that organ, although after the legislature has determined the principles upon which rates shall be regulated it may grant to an administrative organ power to name rates in accordance with those principles, the power of that organ depending upon the completeness with which principles have been stated for its guidance.[30]

Co. v. *Railroad Comn.*, (1906) 38 Ind. App. 439, 450, 451, 78 N. E. 338, 342, 79 N. E. 520. Compare *Central of Ga. Ry. Co.* v. *Railroad Comn.*, (1908) 161 Fed. 925, 985. We must distinguish from the above cases the cases in which other courts have sustained other statutes which declared that the determinations of the commissions should constitute *prima facie* evidence of what were the lawful rates: *Chicago, B. & Q. R. Co.* v. *Jones*, (1894) 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141; *Chicago & N. W. Ry. Co.* v. *Dey*, (1888) 35 Fed. 866, 1 L. R. A. 744; *Tift* v. *Southern Ry. Co.*, (1905) 138 Fed. 753, affirmed, *Southern Ry. Co.* v. *Tift*, (1907) 206 U. S. 428, 27 Sup. Ct. 709; *State* v. *Minneapolis & St. L. R. Co.*, (1900) 80 Minn. 191, 83 N. W. 60; *Burlington, C. R. & N. Ry. Co.* v. *Dey*, (1891) 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436; *State* v. *Freemont, E. & M. V. R. Co.*, (1888) 23 Neb. 117, 36 N. W. 305, (1887) 22 Neb. 313, 35 N. W. 118. The question of delegation of power was discussed only in the Illinois case, the case in 35 Fed., and in *State* v. *Missouri P. Ry. Co.*, (1907) Kan., 92 Pac. 606; *Atlantic E. Co.* v. *Wilmington & W. R. Co.*, (1892) 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393, in the last two of which the remarks were dicta. (See also *Corporation Comn.* v. *Seaboard A. L. System*, (1900) 127 N. C. 283, 288, 37 S. E. 266, 268.) And *Portland & O. C. R. Co.* v. *Grand T. Ry. Co.*, (1858) 46 Me. 69; *Vermont & M. R. Co.* v. *Fitchburg R. Co.*, (1852) 63 Mass. (9 Cush.) 369, were far different from the above: in each case the court, under statutory authority, appointed commissioners to determine the rates which under existing law one party to the action might charge the other party. State statutes upon rate regulation by commission are collected in Beale & Wyman, Railroad Rate Regulation, p. 1081 *et seq.*

[30] So also it seems that a legislature cannot constitutionally grant to a commission power to permit or to refuse to permit combinations between competing carriers without first laying down principles for the guidance of the commission. It is obvious to any one who examines the question dispassionately that some combinations between com-

Some of the courts in sustaining laws which authorized commissions to name rates for future transportation have said that, as economic conditions change from time to time, rates can be named better by a commission than by the legislature, which is not constantly in session.[31] This argument from convenience is certainly a strong one; and decisions that railroad commissions may name specific rates do not necessarily conflict with the decisions that the legislature alone may determine the principles upon which the government shall be conducted.

In declaring that a state might empower a commission to regulate charges for gas and electric service, a court has said that conditions in the several localities differed so greatly that the legislature could not justly establish uniform rates for the entire state and that it would not be practicable for the legislature itself to establish rates in each of the communities.[32] And the same position might properly be taken with regard to charges for transportation. In both cases it is true that the legislature cannot satisfactorily do more than declare the principles which the commission shall apply; although in neither case does it

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peting carriers are decidedly in the interest of the public, that some are not injurious, while still others may prove to be against the public interest. These combinations admit of classification, and it is the duty of the legislature, when regulating them or when providing for their regulation, to declare the lines of division or the principles by which those lines may be clearly ascertained.—A statute of Minnesota which attempted to delegate to a commission an unrestrained veto power over proposed increases in the capitalization of railroads incorporated in that state was declared unconstitutional in *State* v. *Great N. Ry. Co.,* (1907) 100 Minn. 445, 111 N. W. 289, 10 L. R. A. N. S. 250.

[31] *State* v. *Chicago, M. & St. P. Ry. Co.,* (1888) 38 Minn. 281, 37 N. W. 782; *Georgia, R. & B. Co.* v. *Smith,* (1883) 70 Ga. 694; *Tilley* v. *Savannah, F. & W. R. Co.,* (1881) 5 Fed. 641. See also *McWhorter* v. *Pensacola & A. R. Co.,* (1888) 24 Fla. 417, 5 So. 129, 2 L. R. A. 504; *Chicago & N. W. Ry. Co.* v. *Dey,* (1888) 35 Fed. 866, 1 L. R. A. 744; *Trustees* v. *Saratoga G., E. L. & P. Co.,* (1908) 191 N. Y. 123, 83 N. E. 693, 699.

[32] *Trustees* v. *Saratoga G., E. L. & P. Co.,* (1908) 191 N. Y. 123, 83 N. E. 693. And see *State* v. *Chicago, M. & St. P. Ry. Co.,* (1888) 38 Minn. 281, 37 N. W. 782; *Georgia R. & B. Co.* v. *Smith,* (1883) 70 Ga. 694. For other practical arguments in support of the delegation of power to administrative organs, see Young, The Relation of the Executive to the Legislative Power, Proc. Am. Pol. Sci. Assn., I, 47.

follow that the commission may be allowed to decide what those guiding principles shall be.

Some of the courts have also sustained statutes which authorized commissions to name rates upon the ground that in those statutes the legislatures had declared what the law should be and had left to the commissions questions of fact.[33] Certainly where definite standards are established

[33] See *Trustees* v. *Saratoga G., E. L. & P. Co.*, (1908) 191 N. Y. 123, 83 N. E. 693, 700, where the commission was empowered to determine what were reasonable maximum rates; and *State* v. *Chicago, M. & St. P. Ry. Co.*, (1888) 38 Minn. 281, 300, 302, 37 N. W. 782, 787, 788, where the statute provided that the charges should be equal and reasonable. In view of the illustrations used, the courts apparently had this thought in mind in *Tilley* v. *Savannah, F. & W. R. Co.*, (1881) 5 Fed. 641, 657, where the statute provided that if a railroad should charge more than a fair and reasonable rate it should be deemed guilty of extortion, and that a commission should name reasonable and just rates; and in *Chicago & N. W. Ry. Co.* v. *Dey*, (1888) 35 Fed. 866, 874, where the statute provided that if any railroad "shall charge . . more than a fair and reasonable rate . . . . or shall make any unjust or unreasonable charge . . . the same shall be deemed guilty of extortion," and required a commission to make a schedule of reasonable and maximum rates, such schedule to be *prima facie* evidence that the rates named therein were reasonable and just maximum rates. In reference to the illustration in the case last cited, we may remark in passing that in declaring that a carrier should be allowed to earn three per cent. for every act of transportation the legislature would be fixing an unpractical standard; and we may question whether in declaring that the company should earn that percentage from its business as a whole the legislature would be furnishing adequate guidance for the regulation of the separate rates. In *Georgia R. & B. Co.* v. *Smith*, (1883) 70 Ga. 694, (1888) 128 U. S. 174, 9 Sup. Ct. 47, the statute provided that a railroad charging more than a fair and reasonable rate should be deemed guilty of extortion, and provided for the appointment of commissioners who should make schedules of just and reasonable rates. The state court decided, to use the language of the United States Supreme Court, "that it was expected, not that the legislature would itself make specific regulations as to what should in each case be a proper charge, but that it would simply provide the means by which such rates should be ascertained and enforced." In *Chicago, I. & L. Ry. Co.* v. *Railroad Comn.*, (1906) 38 Ind. App. 439, 451, 78 N. E. 338, 342, 79 N. E. 520; *Southern Ry. Co.* v. *Hunt*, (1908) Ind. App., 83 N. E. 721, 725, where the commission was directed, upon complaint, to determine whether the rates charged were just and reasonable, and, if not, to fix just and reasonable rates, the court spoke of the decisions of the commission as to whether a railroad's charges were just and reasonable as determinations of questions of fact. In the Indiana cases, however, the court was not discussing the question of delegation of legislative power. See also cases cited in note 29, *supra*, concerning statutes by which the rates named by commissions furnished *prima facie* evidence as to what were the lawful rates.

by statute a grant of power to ascertain and state what rates will conform to those standards does not violate the rule that legislative power may not be delegated. This principle cannot be disputed. The only question is whether the statutes have in reality left to the commissions merely the determination of matters of fact. To this question, however, the courts have given but very little consideration.

On the other hand, the suggestion which has been made in support of commission-made rates[34] that because the legislature may for historical reasons grant some self-government to localities[35] it may delegate legislative power to other governmental organs is entirely unconvincing. The fact that there is one exception to the rule does not justify the creation of new exceptions. And since the distributive clauses of the state constitutions do not apply to local governments[36] but do apply to the central governments of those states, there is obviously nothing in the argument, which was made in support of rate regulation by a gas and electricity commission,[37] that because a power may be granted to administrative officers of a locality similar power may be granted to administrative officers of the state.

Two opinions also refer to laws declaring that the judiciary may make rules of court.[38] But allowing an organ to regulate procedure before itself is far different from allowing an organ to make rules of substantive law. And the contention that authorizing a commission to name rates is similar to allowing the companies concerned to name their own rates[39] is likewise unsound. A commission acts as an

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[34] See *Tilley* v. *Savannah, F. & W. R. Co.*, (1881) 5 Fed. 641; and also *People* v. *Harper*, (1878) 91 Ill. 357. The opinion in the latter case is criticised in note 73, *infra*.

[35] See page 4, *supra*.

[36] See page 5, *supra*.

[37] *Trustees* v. *Saratoga G., E. L. & P. Co.*, (1908) 191 N. Y. 123, 83 N. E. 693.

[38] *State* v. *Chicago, M. & St. P. Ry. Co.*, (1888) 38 Minn. 281, 37 N. W. 782; *Georgia R. & B. Co.* v. *Smith*, (1883) 70 Ga. 694.

[39] *Tilley* v. *Savannah, F. & W. R. Co.*, (1881) 5 Fed. 641, 656; *McWhorter* v. *Pensacola & A. R. Co.*, (1888) 24 Fla. 417, 5 So. 129, 2 L. R.

organ of government—it interferes with the conduct of third parties in matters in which the commission is not itself interested; while the officers of a railroad, although doing what some governmental organ might do, do not act as agents of the government but interfere with the conduct of others only in matters affecting the company itself.

We shall examine later the position that an administrative body may be granted discretion in the establishment of rates.[40]

The United States Supreme Court has never decided how much power may be granted by Congress to the Interstate Commerce Commission,[41] and the question whether the dis-

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A. 504.—On the converse of this proposition see *Morrow* v. *Wipf,* (1908) S. D., 115 N. W. 1121, 1127; *People* v. *Board of Election Comrs.,* (1906) 221 Ill. 9, 19, 77 N. E. 321, 323, where the courts also failed to notice the distinction, which is pointed out in the text, and declared that a legislature may not allow the officials of a political party to determine the method by which that party shall nominate its candidates. The opinions are unconvincing. A legislature certainly does not delegate legislative power when it allows an organization to decide such questions for itself. If those decisions were sound a law which provided that a railroad should charge two cents a mile for passenger transportation unless its appropriate officers should fix different rates, but that such officers might fix different rates, would have to be held unconstitutional as delegating legislative power to the railroad officials. The cases are parallel.—On the other hand, in *State* v. *Felton,* (1908) 77 Ohio St. 554, 577, 84 N. E. 85, 89, the court by a large majority decided that a law which authorized party officials to prescribe the purpose, time, manner and conditions of holding a primary election and the qualifications of electors did not delegate legislative power. See also note 79, *infra.*

[40] See pages 36-38, *infra.*

[41] There is a dictum that "Congress might itself prescribe the rates, or it might commit to some subordinate tribunal this duty:" *Interstate Com. Comn.* v. *Cincinnati, N. O. & T. P. Ry. Co.,* (1897) 167 U. S. 479, 494, 17 Sup. Ct. 896, 898. See also *Texas & P. Ry. Co.* v. *Interstate Com. Comn.,* (1896) 162 U. S. 197, 216, 16 Sup. Ct. 666, 674; dissenting opinion in *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* (1890) 134 U. S. 418, 464, 10 Sup. Ct. 462, 702, 704; and notes 55, 56, *infra.* But this dictum does little, if anything, towards settling the point now under discussion. And the same comment must be made upon the following sentence from the opinion in *Interstate Com. Comn.* v. *Chicago G. W. Ry. Co.,* (1908) 209 U. S. 108, 117, 28 Sup. Ct. 493, 496, "It is unnecessary to define the full scope and meaning of the prohibition found in sec. 3 of the Interstate Commerce Act [relating to

tribution of powers by the state constitutions has been violated by any administrative order concerning rates has been before that court only in the *Railroad Commission Cases,*[42] where the state court had already declared that the law there considered did not violate the state constitution[43]—a decision which was binding upon all other courts.[44] The United States Supreme Court did briefly announce its concurrence with the interpretation which the state court had placed upon the state constitution.[45] But the attention of

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discriminations], or even to determine whether the language is sufficiently definite to make the duties cast on the Interstate Commerce Commission ministerial, and therefore such as may legally be imposed upon a ministerial body, or legislative, and therefore, under the federal Constitution, a matter for congressional action, for, within any fair construction of the terms 'undue or unreasonable,' the findings of the circuit court place the action of the railroads outside the reach of condemnation."

[42] (1886) 116 U. S. 307, 347, 352, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191; reversing *Farmers' L. & T. Co.* v. *Stone,* (1884) 20 Fed. 270; *Illinois C. R. Co.* v. *Stone,* (1884) 20 Fed. 468.

[43] *Stone* v. *Yazoo & M. V. R. Co.,* (1885) 62 Miss. 607, 645, 21 A. & E. R. Cas. 6, 16, where the only reference to the subject is as follows: "The act creating the railroad commission is not violative of the 14th Amendment of the Constitution of the United States, or of any provision of the constitution of the state, in that it creates a commission and charges it with the duty of supervising railroads;" unless there is some reference to the subject in the declaration, "We hold that the state had the right to create an agency of the state to exercise such supervision as it may lawfully employ over railroads within its limits." See comment on *Stone* v. *Natchez, J. & C. R. Co.* in note 46, *infra.*

[44] "If a state court has decided that a law is in harmony with the state constitution its validity, so far as the state constitution is concerned, cannot be questioned elsewhere:" Patterson, The United States and the States Under the Constitution, 2d ed., p. 282; and see *Smith* v. *Jennings,* (1907) 206 U. S. 276, 278, 27 Sup. Ct. 610, 611; *West* v. *Louisiana,* (1904) 194 U. S. 258, 24 Sup. Ct. 650.

[45] The court stated the contention that the act conferred both legislative and judicial powers on the commission and was therefore repugnant to the constitution of Mississippi, and made simply this reply, "The Supreme Court of Mississippi has decided . . . that the statute is not repugnant to the constitution of the state 'in that it creates a commission and charges it with the duty of supervising railroads.' To this we agree, and this is all that need be decided in this case:" 116 U. S. 336, 6 Sup. Ct. 347.—In *Chicago & N. W. Ry. Co.* v. *Dey,* (1888) 35 Fed. 866, 875, in answer to the contention that legislative power was delegated to commissioners in the statute there considered, the court said that "the validity of the act of the state of Mississippi, delegating like power to a board of railroad commissioners, was before the Su-

all the courts which considered that law was devoted almost exclusively to other constitutional questions,[46] so that it seems that even if the Supreme Court had had the right to pass upon the validity of the delegation of power, its decision upon that point would be of no greater value as a precedent than was that casual decision upon the commerce clause in the *Granger Cases*[47] which was overruled in *Wabash, St. L. & P. Ry. Co.* v. *Illinois*.[48]

In *Chicago, M. & St. P. Ry. Co.* v. *Tompkins*[49] and *Min-*

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preme Court of the United States, and though this specific objection was made by counsel to its validity, the act was sustained," without, however, any special reference being made to this question in the opinion.—An examination of unreported portions of the briefs filed in the Supreme Court shows that counsel did there discuss, with ordinary ability, the question of delegation of legislative power to an administrative body. And in 62 Miss. at 626 there are references to the question of delegation of power in a few authorities cited in a brief against the law. Were it not for the latter, we might say that, so far as shown by the reports of any of the cases, the contention that the statute was not in accordance with the distribution of powers by the state constitution might have meant merely that if the state had any control whatever over the rates of a railroad the charter of which had granted to it in general terms the right to regulate its own rates, that control could be exercised only through a strictly judicial body. In *Illinois C. R. Co.* v. *Stone*, (1884) 20 Fed. 468, 471, the court said, "The question of what is reasonable compensation in such cases is one alone for judicial ascertainment, when not fixed by the charter, and no power is reserved therein, thereafter to fix it."

[46] In addition to the cases cited above, see *Stone* v. *Natchez, J. & C. R. Co.*, (1885) 62 Miss. 646, 21 A. & E. R. Cas. 17, which involves simply the impairment of contract clause. The court there says that the commission merely secured conformity by the road with the implied condition in its charter to carry for reasonable rates. "The final test of reasonablness of rates is not with the railroad commission, but, as before, with the government, through its judiciary. Fixing rates by the commission is not final and conclusive against a railroad company. It is only *prima facie* correct, and may be tested by the courts. If the action of the commission is just, it should prevail. If it is not, it may be assumed that it will not. Of that none should complain. The concession made in the bill of the appellee of the right of judicial control to prevent extortion and unjust discrimination is an admission of the right of government control; and if the state can control or supervise at all it may select the agency through which to exert its right." But it does not follow that the legislature may select an agency as freely as the state itself might do it, and that point is not discussed.

[47] *Chicago, B. & Q. R. Co.* v. *Iowa*, (1876) 94 U. S. 155, 163; *Peik* v. *Chicago & N. W. Ry. Co.*, (1876) 94 U. S. 164, 177, 178.

[48] (1886) 118 U. S. 557, 566-569, 7 Sup. Ct. 4, 7-9.

[49] (1900) 176 U. S. 173, 20 Sup. Ct. 336; (1898) 90 Fed. 363.

neapolis & St. L. R. Co. v. *Minnesota*[50] the question of the delegation of legislative power was not discussed either by the court of last resort or by the lower courts. In *Georgia R. & B. Co.* v. *Smith,*[51] while the court referred to the decision of the state court upon the constitutionality of the delegation of power, it properly refrained from comment thereon. And in *Reagan* v. *Farmers' L. & T. Co.*[52] it had been shown in the lower court[53] that the state of Texas had considered it advisable to amend its constitution in order to authorize the regulation of rates by commission; therefore, while the Supreme Court did say[54] that a *state* may regulate by means of a commission, that case certainly does not show that in the absence of an express provision in the state constitution a *legislature* may bestow upon a commission as much power over rates as the legislature itself might exercise.

The court of last resort has said at times that the naming of specific rates for future transportation is a legislative power,[55] and at times that it is an administrative power,[56] and the court has also appeared undecided upon this point.[57] Yet, as we have already observed[58] that there are some powers which may be exercised by the legislature itself, but the exercise of which is not confined strictly to the legislature and may, therefore, be assigned by it to an

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[50] (1902) 186 U. S. 257, 22 Sup. Ct. 900; *State* v. *Minneapolis & St. L. R. Co.*, (1900) 80 Minn. 191, 83 N. W. 60.

[51] (1888) 128 U. S. 174, 178, 9 Sup. Ct. 47, 48.

[52] (1894) 154 U. S. 362, 14 Sup. Ct. 1047.

[53] *Mercantile T. Co.* v. *Texas & P. Ry. Co.*, (1892) 51 Fed. 529, 532.

[54] 154 U. S. at 393, 394, 14 Sup. Ct. at 1053.

[55] *McChord* v. *Louisville & N. R. Co.*, (1902) 183 U. S. 483, 495, 22 Sup. Ct. 165, 169; *Interstate Com. Comn.* v. *Alabama M. Ry. Co.*, (1897) 168 U. S. 144, 162, 18 Sup. Ct. 45, 47; *Interstate Com. Comn.* v. *Cincinnati, N. O. & T. P. Ry. Co.*, (1897) 167 U. S. 479, 499, 500, 501, 505, 506, 511, 17 Sup. Ct. 896, 900, 901, 902, 903, 905.

[56] *St. Louis & S. F. Ry. Co.* v. *Gill*, (1895) 156 U. S. 649, 663, 15 Sup. Ct. 484, 490; *Reagan* v. *Farmers' L. & T. Co.*, (1894) 154 U. S. 362, 394, 14 Sup. Ct. 1047, 1053. See also note 46, *supra.*

[57] *Reagan* v. *Farmers' L. & T. Co.*, (1894) 154 U. S. 362, 397, 14 Sup. Ct. 1047, 1054.

[58] p. 4, *supra.*

administrative organ, these cases need not confuse us. Taken together they indicate no more than that a commission may not name specific rates without legislative authorization, but that a commission may be authorized to ascertain facts as to rates and to state in specific form principles established by the legislature.

The court has sustained several federal statutes which delegated power to administrative or executive officers and which were attacked upon the ground that the power delegated was legislative,[59] the court saying that the officers were merely authorized to ascertain facts and to apply the law in accordance with those facts. In some of the cases this explanation of the statute is a rather strained one;[60] but the actual decisions in those cases are more than off-set by the reason which the court gave in support of the decisions.[61] And while the court has sustained legislation which delegated to executive officers distinctively congressional power concerning the Philippine Islands,[62] those decisions cannot justify similar legislation for territory which is under the Constitution of the United States.

The court has also sustained a federal law which allowed local authorities to make certain "supplementary regulations" concerning the acquisition of title to public lands.[63]

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[59] *Union B. Co.* v. *United States,* (1907) 204 U. S. 364, 27 Sup. Ct. 367; and cases there cited. And see *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* (1908) 210 U. S. 281, 287, 26 Sup. Ct. 616, 617.

[60] Consider criticisms in dissenting opinion in *Field* v *Clark,* (1892) 143 U. S. 649, 697, 12 Sup. Ct. 495, 506; *Gilhooly* v. *City of Elizabeth,* (1901) 66 N. J. L. 484, 486, 49 Atl. 1106, 1107; and criticism of similar legislation in Prentice and Egan, The Commerce Clause of the Federal Constitution, 313.

[61] On the bearing of *Field* v. *Clark,* (1892) 143 U. S. 649, 12 Sup. Ct. 495, on railroad rate regulation, see also Olney, Railroad Rate Making by Congress, 181 N. A. Rev. 490; Peck, Governmental Regulation of Railroad Rates, 13 Am. Lawyer, 485, 486; Whitney, The Reciprocity Acts of 1890, 31 Am. L. Reg. 186, 187.

[62] *United States* v. *Heinszen,* (1907) 206 U. S. 370, 27 Sup. Ct. 742; *Dorr* v. *United States,* (1904) 195 U. S. 138, 24 Sup. Ct. 808. See also *The Louisa Simpson,* (1871) 2 Sawyer, 57, 61, 71, 15 Fed. Cas. 953, 955, 958.

[63] *Butte C. W. Co.* v. *Baker,* (1905) 196 U. S. 119, 25 Sup. Ct. 211. See also *United States* v. *Ormsbee,* (1896) 74 Fed. 207.

The opinion does not contain a thoroughly satisfactory discussion of the question involved,[64] yet the reason for the decision may be said to be that the court thought that the purpose for which the power had been given to Congress had been sufficiently observed by the regulations which Congress had itself prescribed, and as vast interests would suffer from a decision that the federal statute was unconstitutional the court would not so decide where the invalidity was not clear.[65] As the court did not notice it, we need not lay much stress upon the fact that the local authorities were not merely administrative, and that apparently the "supplementary regulations" were legitimate exercises of local self-government.[66] The decision that the power to

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[64] See 196 U. S. 125, 126, 25 Sup. Ct. 213. The question is how far the power of Congress is exclusive. The court does not show whether the owner of the land had actually granted to its agent, Congress, permission to delegate a portion of the power committed to it.—Granting that Congress thought that it was acting for the best, that fact does not answer the constitutional question.—The question is not whether the power is legislative in its nature, but whether it is entrusted to the exclusive control of Congress, so that even if the court could say boldly that neither the statute nor the "supplementary regulations" were in any aspect legislative in character the problem would not be entirely solved.

[65] A statute must always be upheld unless its invalidity is clear, regardless of the amount involved.

[66] In this case the regulations were made by a state; but a state could not exercise such power over interstate rates: see *Stoutenburgh* v. *Hennick,* (1889) 129 U. S. 141, 9 Sup. Ct. 256; and also *McCornick* v. *Western U. T. Co.,* (1897) 79 Fed. 449, 451; compare *In re Rahrer,* (1891) 140 U. S. 545, 11 Sup. Ct. 865.—Perhaps the statute was analogous to that considered in *In re Rahrer,* and merely withdrew a withdrawable federal restraint upon a state's power over property within its borders. Between the exclusive power of the federal government and the exclusive power of the states there are fields of jurisdiction which Congress may place under state control, which are of such a nature that we might say that the state and federal governments held them in common because of vicinage to the exclusive domains of each, were it not for the rule of the supremacy of federal law, a rule found in the Constitution but sometimes misapplied; in addition to *In re Rahrer* see Patterson, The United States and the States Under the Constitution, 2d ed., p. 269, note; and, by way of analogy, p. 4, *supra.* Thus, while Congress may not authorize the states to coin money it may authorize them to tax federal agencies which are within their borders: see Patterson, *op. cit.,* p. 48; and also U. S. Constitution, Art. I, sec. 10.—In connection with this note in general consider also *Kansas* v. *Colorado,* (1907) 206 U. S. 46, 92, 27 Sup Ct. 655, 665; *Allen*

make those "supplementary regulations" had not been clearly shown to belong exclusively to Congress, while it may have some bearing upon the question how far the power of Congress under the commerce clause is exclusive, does not constitute a decision upon the extent to which the power of Congress is exclusive under any clause of the Constitution other than the one considered in that case.[67]

The Supreme Court of the United States has also referred to the distribution of governmental powers in several cases involving state legislation, but its remarks upon the subject in those cases were of comparatively little value.[68]

Turning again to the decisions of state courts, we must note that they have frequently sustained legislation by which administrative officers were empowered to apply the law in accordance with facts to be ascertained by those officers. Thus they have sustained legislation by which a commission was authorized to mark boundary lines between

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v. *Riley,* (1906) 203 U. S. 347, 27 Sup. Ct. 95; *Woods & Sons* v *Carl,* (1906) 203 U. S. 358, 27 Sup. Ct. 99; 2 Am. Pol. Sci. Rev. 347.

[67] "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details:" *Wayman* v. *Southard,* (1825) 10 Wheat. 1, 43.

[68] *Michigan C. R. Co.* v. *Powers,* (1906) 201 U. S. 245, 26 Sup. Ct. 459, where the distribution was clearly directed by the state constitution; *Dreyer* v. *Illinois,* (1902) 187 U. S. 71, 23 Supt. Ct. 28; *St. Louis C. C. Co.* v. *Illinois,* (1902) 185 U. S. 203, 22 Sup. Ct. 616. The two latter cases had been taken up from the state court of last resort. The rule as to the distribution of governmental powers is distinctly separate from other rules of the constitutions, however much laws which violate that rule may also violate other rules. The court said in *Atlantic C. L. R. Co.* v. *North C. Corp. Comn.,* (1907) 206 U. S. 1, 19, 27 Sup. Ct. 585, 591, that state regulation of railroads "may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end." The case came up from the supreme court of the state, and the question of delegation of power was not considered. Every one must admit that a legislature may confer some power upon commissions. But the case does nothing whatever toward clearing up the question of how much power a legislature may bestow upon a commission without violating that distribution of powers which is usually made by the constitutions.

counties,[69] a commission was authorized to determine the efficiency of a voting-machine the use of which, if efficient, was directed by law,[70] examining boards were authorized to inquire into the qualifications of persons seeking to exercise designated public occupations and to license those who were properly qualified,[71] state boards were authorized

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[69] *Trinity County* v. *Mendocino County,* (1907) 151 Cal. 279, 90 Pac. 685. Although the line was marked incorrectly it constituted the legal boundary. In *Kennedy* v. *Mayor,* (1902) 24 R. I. 461, 53 Atl. 317, the court sustained a law which directed the appointment of a commission to divide a city into wards and voting-districts. The correctness of the decision is not quite so clear as the correctness of the decision in *Trinity County* v. *Mendocino County,* but it seems to be sound. See also *In re Hunter,* (1908) Minn., 116 N. W. 922, 924. *Rouse* v. *Thompson,* (1907) 228 Ill. 522, 81 N. E. 1109, was different from the above cases. In it the court declared unconstitutional an act authorizing political committees to establish delegate districts in their respective counties. The decision can be supported, if at all, only upon the ground that so much discretion was allowed to the committees that their decisions would be of a legislative nature, and that the committees were of such a character that legislation by them could not be justified as exercises of local self-government. But while the court uses language which taken alone would indicate that it considered the work strictly legislative in character, it deprives that language of any importance by apparently admitting that the work could be entrusted to an administrative organ and insisting that the committees could not constitutionally be made governmental organs. In taking the latter ground the court seems to be in error: see 8 Cyc. 831; *Scholle* v. *State,* (1900) 90 Md. 729, 46 Atl. 326, 50 L. R. A. 411; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* (1908) 210 U. S. 281, 287, 28 Sup. Ct. 616, 617; dissenting opinion in *Rouse* v. *Thompson;* discussion of this case in 21 Harv. L. Rev. 215, 216.

[70] *Elwell* v. *Comstock,* (1906) 99 Minn. 261, 109 N. W. 113, 698, 7 L. R. A. N. S. 621.

[71] *Ex parte McManus,* (1907) 151 Cal. 331, 90 Pac. 702, state board of architecture—see concurring opinion; *In re Thompson,* (1904) 36 Wash. 377, 78 Pac. 899, state board of dental examiners; *State* v. *Briggs,* (1904) 45 Ore. 366, 77 Pac. 750, 78 Pac. 361, state board of barber examiners; *Ex parte Whitley,* (1904) 144 Cal. 167, 77 Pac. 879, state board of dental examiners; *Ex parte Gerino,* (1904) 143 Cal. 412, 77 Pac. 166, state board of medical examiners; *State* v. *Thompson,* (1901) 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950, state auditor authorized to license persons of good character to make books on horse races at race courses of good repute; *State* v. *Heinemann,* (1891) 80 Wis. 253, 49 N. W. 818, state board of pharmacy. See also *State* v. *Chittenden,* (1906) 127 Wis. 468, 107 N. W. 500; *Hildreth* v. *Crawford,* (1884) 65 Iowa, 339, 21 N. W. 667; U. S. Rev. Stats., secs. 4439-4442, 5 Fed. Stats. An. 398-400. And there have been a number of cases in which similar statutes were sustained without any consideration of the question of delegation of legislative power. *Contra, Harmon* v. *State,* (1902) 66 Ohio St. 249, 64 N. E. 117, 58 L. R. A. 618, where a

to issue quarantine and other regulations for the protection of the health of the community,[72] and other similar or supposedly similar delegations of power were made.[73]

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statute which authorized examiners to license steam engineers who should be found "trustworthy and competent" was declared invalid on the ground that it delegated legislative power. The only case cited by the court was *Mathews* v. *Murphy,* referred to in note 73, *infra,* and it is not clear that that case turned upon the question of delegation of legislative power. Compare *State* v. *Gardner,* (1898) 58 Ohio St. 599, 51 N. E. 136, 41 L. R. A. 689. In connection with *Harmon* v. *State* consider also cases cited in note 73, *infra.*

[72] *Pierce* v. *Doolittle,* (1906) 130 Iowa, 333, 106 N. W. 751, 6 L. R. A. N. S. 143; *Blue* v. *Beach,* (1900) 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64. See also *Isenhour* v. *State,* (1901) 157 Ind. 517, 60 N. E. 40; *Hurst* v. *Warner,* (1894) 102 Mich 238, 60 N. W. 440, 26 L. R. A. 484; *Koppala* v. *State,* (1907) Wyo., 89 Pac. 576, 579; *Cooper* v. *Schults* (1866) 32 How. Pr. (N. Y.) 107 (in the last of which the courts sustained a broad grant of power to commissioners appointed by the governor and senate: see pp. 112, 124); *Walker* v. *Towle,* (1901) 156 Ind. 639, 59 N. E. 20, 53 L. R. A. 749; and the following cases in which live stock quarantine regulations were sustained: *State* v. *Southern Ry. Co.,* (1906) 141 N. C. 846, 54 S. E. 294; *Commonwealth* v. *Cooper,* (1902) 27 Pa. Co. Ct. 199; *State* v. *Rasmussen,* (1900) 7 Idaho, 1, 11, 59 Pac. 933, 936. In *Ex parte Cox,* (1883) 63 Cal. 21, where a statute was declared unconstitutional, too broad a power had been granted to the viticultural commissioners. In *State* v. *Burdge,* (1897) 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157, the court may have decided correctly in sustaining the same objection to a statute (as interpreted by the state board of health) which dealt with dangerous contagious diseases. But in *Schaezlein* v. *Cabaniss,* (1902) 135 Cal. 466, 67 Pac. 755, 56 L. R. A. 733, the court seems to have been in error in declaring unconstitutional a statute which provided that if in any factory there were produced dangerous substances that were liable to be inhaled by the employees, and it appeared to the commissioner of labor statistics that by the use of some mechanical contrivance such inhalation could be to a great extent prevented, he should require the use of such contrivance. With that case compare, in addition to the cases cited above, *Arms* v. *Ayer,* (1901) 192 Ill. 601, 61 N. E. 851, which concerned a law conferring upon factory inspectors power as to the erection of fire escapes; *State* v. *Vickens,* (1905) 186 Mo. 103, 84 S. W. 908, which concerned a law conferring upon factory inspectors powers the extent of which is not clearly shown in the opinion; and *Spiegler* v. *City of Chicago,* (1905) 216 Ill. 114, 128, 74 N. E. 718, 722, which concerned an ordinance which declared that devices, to be approved by the commissioner of public works, should be placed upon oil-wagons to prevent the spilling of oil.

[73] See page 16 and notes 69, 72, *supra;* and language of court in *Central of Ga. Ry. Co.* v. *Railroad Comm.,* (1908) 161 Fed. 925, at 986. In *Hand* v. *Stapleton,* (1903) 135 Ala. 156, 33 So. 689, commissioners were directed to construct county buildings at a new location if they should find that the work could be paid for without an increase in the tax rate. In *People* v. *Harper,* (1878) 91 Ill. 357, commissioners were authorized to name inspection fees: the legislature

While the courts have not always sustained statutes upon those subjects, partly because some of the statutes which were declared unconstitutional differed in character from those which were sustained, and partly because some courts

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stated the principle to be followed, though the court does not dwell on this fact but sustains the statute with unsound reasoning. In *Lothrop* v. *Stedman,* (1875) 42 Conn. (Supp.) 583, Fed. Cas. No. 8519, a commissioner was directed to determine and announce whether a company made up a deficiency in its assets, thus avoiding a conditional repeal of its charter. Local option and similar laws have been frequently sustained upon the ground that the power delegated was merely that of determining questions of fact. It seems that that ground does not furnish a correct basis for those decisions: see note 7, *supra.* It may, possibly, answer objections to statutes considered in *State* v. *Bryan,* (1905) 50 Fla. 293, 39 So. 929, 953; *Leeper* v. *State,* (1899) 103 Tenn. 500, 524, 53 S. W. 962, 967, 48 L. R. A. 167, 172; and to some portions of the statute considered in *In re Gilbert E. Ry. Co.,* (1877) 70 N. Y. 361, 366, 374; *In re New York E. R. Co.,* (1877) 70 N. Y. 327, though it seems that other portions of the New York statute can be supported better, if not only, upon the ground that the power was granted to local authorities: see page 4, *supra.* A statute which authorized county commissioners to determine the width of tires which must be used for the transportation of heavy loads upon the public roads of their respective counties, was sustained in *State* v. *Messenger,* (1900) 63 Ohio St. 398, 59 N. E. 105, not only upon the ground that a power of local government was thereby granted to local authorities, but also upon the ground that those authorities were directed to determine questions of fact. In *People* v. *Delaware & H. C. Co.,* (1898) 32 N. Y. App. Div. 120, 52 N. Y. Supp. 850, affirmed (1901) 165 N. Y. 362, 59 N. E. 138, the court decided that legislative power was not delegated by a statute which empowered commissioners, acting judicially, it was said, to determine the necessity of railroad accommodations. And statutes authorizing commissions to issue orders concerning the construction and operation of railroads have been enforced without any consideration of the question of delegation of legislative power in a number of cases. On the other hand, in *Noel* v. *People,* (1900) 187 Ill. 587, 58 N. E. 616, the court decided that legislative power was delegated by a statute which granted to a board of pharmacy an unconditional power to say, as to some parts of the state, what individuals who were not registered pharmacists should be permitted to sell patent and proprietary medicines and domestic remedies, and under what restrictions those drugs should be sold, although the court admitted the validity of that part of the statute which provided that no one might sell medicines which he had prepared or compounded himself unless he were a registered pharmacist. And in *Mathews* v. *Murphy,* (1901) 23 Ky. L. Rep. 750, 63 S. W. 785, 54 L. R. A. 415, the court decided that the state board of health might not revoke a license to practice medicine because of "grossly unprofessional conduct of a character calculated to deceive or defraud the public," although admitting the validity of that part of the statute which authorized the board to pass upon the qualifications of persons seeking licenses to practice medicine; yet it is doubtful whether that case turned upon the question of delegation of legislative power.

have taken a stricter view of the limitations upon delegations of power by the legislature than have been taken by other courts, it seems clear that constitutional statutes upon those subjects may be framed. Such questions, for instance, as the appropriate preventive of the spread of small pox, and whether a man possesses the normal qualifications of an architect, are undeniably questions of fact.

But there is a clear difference between determining the precise application of a law established by the legislature and stating in specific form a regulation which is not the application of a law established by the legislature. Or, to refer more definitely to railroad commissions, while a legislature certainly may authorize such a commission to investigate questions concerning rates and to state in specific form the rates which may be charged thereafter, if it has clearly established the principles which are to be applied by the commission, the cases which we have just considered do not warrant the assertion that the legislature may endow the commission with a wide discretion as to the rates which shall be fixed. We have seen from other authorities that while the legislature may authorize a commission to ascertain facts and to apply the law in accordance with those facts, it must point out the facts which are to be ascertained, it must determine the law which is to be applied.[74]

The courts have also held that a statute the operation of which depends upon a contingency does not necessarily delegate legislative power. It may declare completely the principles of governmental action, although other forces determine the result of that declaration of principles. Thus the treatment of a foreign corporation may be made to depend upon the treatment which the home state of that corporation extends to corporations of the state whose legislation is being considered;[75] commissioners may be author-

[74] See cases cited in note 26, *supra*.

[75] *People* v. *Fire Assn. of Phila.*, (1883) 92 N. Y. 311; *Phoenix I.*

ized to construct new county buildings if they shall find that the work will not require an increase in the tax rate,[76] to remove *de facto* a county seat upon the erection of suitable buildings at a new location,[77] or to remove the county records to another town and erect a court house there if the town or its citizens shall, to the satisfaction of the commissioners and without expense to the county, provide suitable temporary accommodations and a suitable building site;[78] a legislature may require a railroad company to stop its trains at a designated place if individuals shall, within a given time, there erect a station building and convey it, with the land thereunder, to the company;[79] a legislature

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Co. v. *Welch,* (1883) 29 Kan. 672; *Home I. Co.* v. *Swigert,* (1882) 104 Ill. 653; and see *Talbott* v. *Fidelity & C. Co.,* (1891) 74 Md. 536, 545, 22 Atl. 395, 398. *Contra, Clark & Murrel* v. *Port of Mobile,* (1880) 67 Ala. 217. It is submitted that, while the decisions in support of the statutes are sound, some of the cases which the Kansas and Illinois courts cite with approval were not legitimate instances of contingent legislation. In *Brig Aurora* v. *United States,* (1813) 7 Cranch, 382, the court sustained an act by which an embargo resulted upon action by Great Britian. And in *Field* v. *Clark,* (1892) 143 U. S. 649, 12 Sup. Ct. 495, the court sustained a federal reciprocity statute in which the contingency was not indicated as definitely as in the above statutes.

[76] *Hand* v. *Stapleton,* (1903) 135 Ala. 156, 33 So. 689.

[77] *Peck* v. *Weddell,* (1867) 17 Ohio St. 271.

[78] *Walton* v. *Greenwood,* (1872) 60 Me. 356.

[79] *State* v. *New Haven & N. Co.,* (1876) 43 Conn. 351. The court gave but slight consideration to the question. In *Mayor* v. *Clunet,* (1865) 23 Md. 449, 466-470, after a fuller discussion, the court sustained an *ordinance* for the opening of a street which provided that it should not go into effect until designated individuals had adjusted claims against the city arising out of a prior ordinance for the same purpose which had been repealed after it had been partly executed. On the other hand, in *Owensboro & N. R. Co.* v. *Todd,* (1891) 91 Ky. 175, 15 S. W. 56, 11 L. R. A. 285, the court, without giving satisfactory reasons, declared that legislative power was delegated by an act which provided that, where land for the right of way had been given to a railroad company, the owners of adjoining lands might thereafter require the company to fence the right of way at its own expense; and in *Loughbridge* v. *Harris,* (1871) 42 Ga. 500, is an unmistakably incorrect declaration that a mill dam act delegated legislative power. See also note 39, *supra.*—As a legislature does not necessarily allow an individual to shape the policy of the government whenever it makes the operation of a statute contingent upon his action or decision, it seems that it may at times make the operation of a statute to depend upon his decision whether or not he will contribute from his own possessions or whether he will waive or claim rights against other individuals or against the state, even though it may not grant to any one a right to in-

may repeal the charter of a company with the proviso that the repeal shall not go into effect if the company shall by a named date make up a deficiency in its assets;[80] and, though it is questionable whether this is really contingent legislation, the legislature may doubtless empower individuals to do certain acts without compelling them to do so, as in the statutes authorizing the formation of corporations.

Yet obviously it does not follow that because contingent legislation may be constitutional therefore a statute must be valid if its operation is uncertain. In the cases which we have already considered the policy of the state was determined only by the legislature; but it would be far otherwise if the contingency consisted of the will of another organ of government. It is true that in a number of cases the courts have sustained statutes which in reality delegated legislative power to the voters or the authorities of localities, upon the ground that in each case the operation of the statute was contingent.[81] And yet, without criticising the actual deci-

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terfere with the property or conduct of others save for the obtaining of rights which are granted to, or already belonged to, himself.—The court in *In re New York E. R. Co.*, (1877) 70 N. Y. 327, 343, 344, gave an unsound reason for saying that the commission must be allowed to determine for the incorporators a number of questions concerning the organization of the company.

[80] *Lothrop* v. *Stedman*, (1875) 42 Conn. (Supp.) 583, Fed. Cas. No. 8519.

[81] See, *e. g.*, *People* v. *McBride*, (1908) Ill., 84 N. E. 865, 872; *Picton* v. *Cass County*, (1904) 13 N. D. 242, 100 N. W. 711; *Ansley* v. *Ainsworth*, (1902) 4 Ind. Ter. 308, 69 S. W. 884; *State* v. *Cooley*, (1896) 65 Minn. 406, 68 N. W. 66; *Lum* v. *Mayor*, (1895) 72 Miss. 950, 18 So. 476; *State* v. *Pond*, (1887) 93 Mo. 606, 6 S. W. 469; *People* v. *Hoffman*, (1886) 116 Ill. 587, 5 N. E. 596; *Schulherr* v. *Bordeaux*, (1886) 64 Miss. 59, 8 So. 201; *Clarke* v. *Rogers*, (1883) 81 Ky. 43; *People* v. *City of Butte*, (1881) 4 Mont. 174, 1 Pac. 414; *Guild* v. *City of Chicago*, (1876) 82 Ill. 472; *Fell* v. *State*, (1875) 42 Md. 71; *Locke's Appeal*, (1873) 72 Pa. 491; *Alcorn* v. *Hamer*, (1860) 38 Miss. 652 (in which case the briefs were elaborate); *Bull* v. *Read*, (1855) 13 Gratt. (Va.) 78; *Cincinnati, W. & Z. R. Co.* v. *Comrs.*, (1852) 1 Ohio St. 77; and also *State* v. *Fountain*, (1908) Del., 69 Atl. 926, 934; *Thalheimer* v. *Board of Suprs.*, (1908) Ariz., 94 Pac. 1129; *Ward* v. *State*, (1908) Ala., 45 So. 655; *State* v. *Kline*, (1907) Ore., 93 Pac. 237; *Fouts* v. *Hood River*, (1905) 46 Ore. 492, 81 Pac. 370, 1 L. R. A. N. S. 483; *In re New York E. R. Co.*, (1877) 70 N. Y. 327; *State* v. *O'Neill*, (1869) 24 Wis. 149; *State* v. *Hunter*, (1888) 38 Kan. 578, 17 Pac. 177 (in which case the appointment of commissioners and the exercise of powers by them

sions, we must note that not only does the reason given in support of them appear to be insufficient when considered by itself,[82] but its unsoundness is further shown by the fact that if the statutes were sustainable only upon that reason the decisions would be flatly inconsistent with the decisions that the legislature may not submit to the voters of the entire state the question whether or not a law shall become operative.[83] On the other hand, no question of the consistency of the two lines of decisions could arise if the former had been based upon the ground that the legislature may grant some self-government to the localities.[84]

Nor may any right of the legislature to submit the questions *whether* or *when* a statute shall be executed[85] be based

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were acts administrative in their nature for the improvement, where necessary, of the execution of a law the excution of which had been already ordered); Cooley, Constitutional Limitations, 7th ed., 167; Sutherland, Statutory Construction, 2d ed., p. 170; Oberholtzer, The Referendum in America, 328. In some of the earlier decisions, while the courts hold that the statutes are constitutional, they apparently consider that a statute may be so worded that after a vote is taken the constitutionality of a condition subsequent will be unimportant: that in case of a vote to enforce the law the condition may be ignored: see *State* v. *Parker*, (1857) 26 Vt. 357, 363; *Alcorn* v. *Hamer*, (1860) 38 Miss. 652; although in case of a contrary vote, whether the condition were constitutional or not, the statute could not be enforced.

[82] The distinction between valid and invalid contingent legislation is further brought out in *People* v. *Fire Assn. of Phila.*, (1883) 92 N. Y. 311, 322, 323; *Barto* v. *Himrod*, (1853) 8 N. Y. 483, 490, 495; *Ex parte Wall*, (1874) 48 Cal. 279, 315; *Central of Ga. Ry. Co.* v. *Railroad Comn.*, (1908) 161 Fed. 925, 986.

[83] See note 87, *infra*.

[84] See page 4, *supra*.

[85] On the point that it was not the statute but the operation of the statute which was contingent, see *Cincinnati, W. & Z. R. Co.* v. *Comrs.*, (1852) 1 Ohio St. 77; *Locke's Appeal*, (1873) 72 Pa. 491; *Picton* v. *Cass County*, (1904) 13 N. D. 242, 100 N. W. 711; *Clarke* v. *Rogers*, (1883) 81 Ky. 43; *People* v. *City of Butte*, (1881) 4 Mont. 174, 1 Pac. 414; *People* v. *Reynolds*, (1848) 5 Gil. (Ill.) 1; *State* v. *Kline*, (1907) Ore., 93 Pac. 237. In the Ohio case the court said, p. 88, "The law is, therefore, perfect, final, and decisive in all its parts, and the discretion given only relates to its execution. It may be employed or not employed; if employed, it rules throughout; if not employed, it still remains the law, ready to be applied whenever the preliminary condition is performed. The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first

upon its undoubted right to allow administrative bodies to decide some questions concerning the execution of statutes which do not involve the desirability of governmental action.[86]

As just stated, the weight of authority is decidedly against the constitutionality of a submission to the voters of the entire state of the question whether or not a law shall become operative;[87] and yet a concession of the validity of such legislation would not involve a concession of the validity of legislation which should grant a similar veto power to an administrative organ. And even if the legislature after framing an otherwise complete statute might allow an administrative organ to decide whether or not that statute should be enforced, it would not necessarily follow that the legislature might allow such an organ to decide upon the terms of a statute, although unless that power were grantable the legislature might not bestow upon an administrative organ any power over railroad rates further than to apply regulations made by the legislature.

In view of the cases as to the contingent treatment of foreign corporations, it seems that a state might make the local railroad rates to depend upon the rates which the federal government might establish for interstate transportation, and, conversely, the federal government might make the interstate rates to depend upon the rates which the states might establish for local transportation.[88] This

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can not be done; to the latter no valid objection can be made." Observe the phraseology. But while the legislature unquestionably may grant the power to use some discretion when executing a statute, yet, except where legislative power may be delegated, *valid objection certainly can be made to a grant of discretion as to whether or not a statute shall be executed.*

[86] See note 22, *supra.*

[87] See Oberholtzer, The Referendum in America, 208-217; Cooley, Constitutional Limitations, 7th ed., 168 *et seq.*; 6 A. & E. Enc. of L., 2d ed., 1022.

[88] This does not mean that a state legislature might in all cases make local rates depend upon interstate rates established *by the carriers,* or, conversely, that Congress might in all cases make interstate rates depend upon local rates established *by the carriers.* The commerce clause would at times affect such legislation. *Louisville &*

would certainly be true if we could be sure that after such a law was passed the basic rates would in every instance be established simply with a view to their effect upon the transportation subject to the sovereignty establishing them and without regard to their effect upon rates not subject to that sovereignty. And it is questionable whether, when

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N. R. Co. v. *Eubank*, (1902) 184 U. S. 27, 22 Sup. Ct. 277, which arose under that clause, decides that a state may not forbid a railroad to charge more for carrying between two points within the state than it charges for a longer interstate haul which includes the shorter route, when the prohibition would have a direct effect upon interstate commerce. The company was commanded to change the rate for either the local or the interstate haul. In the case considered the earnings from the local haul were more important. Therefore, rather than lower its local rate, the company would have raised its interstate rate, although on its so doing its competitors would have secured its interstate traffic. It seems, however, that if the local earnings had been less important than the interstate earnings the court should have held that the regulation did not violate the commerce clause, for in that case the company would have retained its interstate, and lowered its local, rate, which was probably the main result sought by the state. It seems also that if a minimum interstate rate had been fixed by the federal government, and, therefore, that rate could not have been reduced by the carrier, the long and short haul provision should have been sustained, for it would have affected only the changeable rate—that for the shorter, and not for the interstate, haul. The court lends support to this position by referring to a hypothetical case in which local rates are fixed by state statute and then saying, "Congress does not interfere with local rates by adopting their sum as the interstate rate." These words, of course, must be read in their proper connection, for if they referred to local rates which are fixed by the carrier the dictum would be inconsistent with the decision in the case under consideration. If Congress were allowed to adopt as the interstate rate the sum of the local rates established by the carrier it might in some cases directly affect local rates, according to the present decision, and Congress may not interfere with local commerce to any greater extent than the states may interfere with interstate commerce: the Tenth Amendment is fully as much a part of the federal Constitution as is the eighth section of Article I. It seems, therefore, that if Congress should declare that through rates should be the sum of the local rates as fixed by the carriers the question whether the act could constitutionally be applied should depend in each case on whether the local earnings or the interstate earnings were of more importance to the carrier. It is true that the view of the case taken in this note does not thoroughly coincide with that taken in portions of the opinion. Thus the court says, "The vice of the provision lies in the regulation of the rates between points wholly within the state, by the rates which obtain between points outside of and those which are within the state." But both earlier and later in the opinion the decision is based on the effect of the regulation, and the facts of the case do not warrant reference to it for the establishment of any other test of constitutionality.

considering an alleged delegation of power, a court might inquire into the motive underlying the establishment of the basic rates.

It may be conceded that the federal statute which provides that, in cases where they apply, the laws of the several states shall be regarded by the federal courts as rules of decision in trials at common law[89] is hardly in point, for so far as substantive law is concerned Congress could not constitutionally have provided otherwise.[90] And hardly analogous is the federal statute which provides that, in common law causes, the circuit and district courts shall enforce such remedies upon judgments as were, at the time the statute was enacted, provided by the laws of the states within which those courts are held and such remedies upon judgments as were or may be subsequently provided by state laws and adopted by general rules of those courts.[91] Nor is that statute analogous which provides that, in civil causes other than equity and admiralty causes, those courts shall follow as nearly as may be the procedure in the courts of record of the states within which such circuit and district courts are held, any rule of court to the contrary notwithstanding.[92] The latter statute, which, if it were inter-

[89] Rev. Stats., sec. 721; 4 Fed. Stats. An. 517; Rose, Code of Federal Procedure, sec. 12.

[90] See Patterson, The United States and the States Under the Constitution, 2d ed., sec. 109; Rose, Code of Federal Procedure, secs. 10, notes a, r, 799, note c. And those laws must also be so regarded in trials in chancery.

[91] Rev. Stats., sec. 916; 4 Fed. Stats. An. 580; Rose, Code of Federal Procedure, sec. 925; *Fink* v. *O'Neil,* (1882) 106 U. S. 272, 1 Sup. Ct. 325; *Ex parte Boyd,* (1882) 105 U. S. 647, 651; *Ross* v. *Duval,* (1839) 13 Pet. 45; *Wayman* v. *Southard,* (1825) 10 Wheat. 1; *Bank of the U. S.* v. *Halstead,* (1825) 10 Wheat. 51. In spite of the decisions and the language of Marshall, C. J., in *Wayman* v. *Southard,* 10 Wheat. at 49, 50, it does not seem clear that, in a case in which the jurisdiction is based upon the diverse citizenship of the parties, a federal court may constitutionally ignore a then-existing state law, for example, as to stays of execution or exemptions from execution, if the state is not seeking to thwart the federal remedy by allowing a special stay or exemption to such defendant or defendants. See also Rev. Stats., sec. 915; 4 Fed. Stats. An. 577; Rose, Code of Federal Procedure, sec. 905.

[92] Rev. Stats., sec. 914; 4 Fed. Stats. An. 563; Rose, Code of Federal Procedure, sec. 900.—Consider also 2 Am. Pol. Sci. Rev. 364.

preted in accordance with its probable meaning, would allow the state authorities incidentally to change the procedure in federal courts,[93] might possibly be sustained upon the ground upon which were sustained the less sweeping earlier statutes which merely adopted the procedure then followed by state courts and authorized the federal courts to alter and add to such rules:[94] the Supreme Court said that the providing of such rules was not an act exclusively legislative in character and might be entrusted to the courts concerned.[95] The statute under consideration, however, has been so interpreted by the Supreme Court as to make it unnecessary for federal courts to follow the procedure in the courts of record of the states within which the federal courts are held.[96]

But while the determination of the principles upon which rates shall be regulated is exclusively legislative in its character, and might not be entrusted by the state legislatures to Congress or by Congress to the state legislatures, it seems that a legislative body would not be delegating its power if it provided that rates which were subject to it should be affected as the merely incidental result of regulation by the legislature of another sovereignty of rates which were subject to regulation by that other body.

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[93] Not, however, of course, where the federal courts would thereby be required to act contrary to the federal Constitution or a federal statute: see Rose, Code of Federal Procedure, sec. 900, note f.

[94] Rose, Code of Federal Procedure, sec. 900, notes a, aa.

[95] Of course, it does not necessarily follow that, because the legislature may entrust a power to the organ concerned, the legislature may entrust that power to a third authority. Still, so far at least as regards cases in which federal courts acquire jurisdiction by reason of the diverse citizenship of the parties, the statutes under consideration obviously carry out the purpose for which jurisdiction was granted to the federal courts far better than would any statutes which established uniform rules of procedure and uniform remedies upon judgments throughout the entire country.

[96] See *Boston & M. R.* v. *Gokey*, (1908) 210 U. S. 155, 28 Sup. Ct. 657; case there cited; Rose, Code of Federal Procedure, sec. 805, beginning of note b, sec. 900, note g. Rev. Stats., sec. 914, was taken from a statute enacted much later than that from which Rev. Stats., sec. 918, was taken, and the courts, in interpreting the Revised Statutes, ought to give weight to that fact. See note at 4 Fed. Stats. An. 585, on the operation of sec. 914.

The courts have also at times sustained legislation which granted discretion to administrative organs. Where the discretion granted was not great[97] the decisions are probably correct, for the legislature cannot be expected to determine every unimportant question which may arise. But other decisions which sustain larger grants of discretion[98]

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[97] See, *e. g., State* v. *Wagener,* (1899) 77 Minn. 483, 80 N. W. 633, 46 L. R. A. 442; *In re Kollock,* (1897) 165 U. S. 526, 17 Sup. Ct. 444; language used in *Wayman* v. *Southard,* (1825) 10 Wheat. 1, 43, quoted in note 67, *supra;* 10 Wheat. 45, 46; *Jermyn* v. *Fowler,* (1898) 186 Pa. 595, 40 Atl. 972, where one of the two inconsistent positions taken by the court was that the board might be granted a discretion as to matters of detail; and also *St. Louis, I. M. & S. Ry. Co.* v. *Neal,* (1906) Ark., 98 S. W. 958, 961; *State* v. *Bryan,* (1905) 50 Fla. 293, 39 So. 929, 953; *Woodruff* v. *New Y. & N. E. R. Co.,* (1890) 59 Conn. 63, 84, 20 Atl. 17, 19; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* (1908) 210 U. S. 281, 287, 26 Sup. Ct. 616, 617; *In re Opinion of Justices,* (1907) N. H., 68 Atl. 873. Compare *Fite* v. *State,* (1905) 114 Tenn. 646, 658, 659, 88 S. W. 941, 944, 1 L. R. A. N. S. 520, 525; *Central of Ga. Ry. Co.* v. *Railroad Comn.,* (1908) 161 Fed. 925, 985; other cases cited in note 26, *supra;* and *State* v. *Burdge,* (1897) 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157.

[98] *Brady* v. *Mattern,* (1904) 125 Iowa, 158, 100 N. W. 358. (The court overlooks the insurance commissioner cases, cited in note 26, *supra,* and it cites *Ryan* v. *Outagamie County,* (1891) 80 Wis. 336, 50 N. W. 340, although the reason given for the Wisconsin decision is flatly in conflict with that on which the Iowa decision is based. The opinion in the Iowa railroad commission case, which is one of the two commission cases cited, does not mention the question of delegation of legislative power.) *State* v. *Preferred T. M. Co.,* (1904) 184 Mo. 160, 82 S. W. 1075. (The court says that in an earlier Missouri case an act requiring a uniform policy of insurance, to be approved by the Superintendent of Insurance, was held to be constitutional, although in that case the court did *not* hold that the act was constitutional; it cites an insurance company case which has nothing to do with the question; and it cites a case upholding the validity of an ordinance which provided for the licensing of engineers.) The decisions in *Kingman et al., Petitioners,* (1891) 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417 (compare *State* v. *Hudson Co. Ave. Comrs.,* (1874) 37 N. J. L. 12, 19; the Massachusetts case was followed in later cases in the same state, cited in L. R. A. Cases as Authorities); *Martin* v. *Witherspoon,* (1882) 135 Mass. 175 (no authorities cited; compare *Board of Harbor Comrs.* v. *Excelsior R. Co.,* (1891) 88 Cal. 491, 26 Pac. 375); *Ingram* v. *State,* (1864) 39 Ala. 247 (no authorities cited); *In re Senate Bill,* (1889) 12 Colo. 188, 21 Pac. 481 (where, however, it does not appear that the general question of delegation of legislative power was considered), are also unsound. The constitutionality of the acts considered in *Arnett* v. *State,* (1907) 168 Ind. 180, 80 N. E. 153, 8 L. R. A. N. S. 1192; *State v. Missouri P. Ry. Co.,* (1907) Kan., 92 Pac. 606; *State* v. *Barringer,* (1892) 110 N. C. 525, 14 S. E. 781;

can be supported only on the assumption that the legislature may delegate legislative power upon important subjects which it may specify; and in still other cases (among them the oft-cited Ohio case in which the court sustained a statute allowing the people of the respective counties to decide whether or not county bonds should be issued in aid of railroad construction)[99] while the decisions are doubtless sound the reasoning upon which those decisions are based can be supported only upon the same assumption.

If, where an administrative organ received large grants of discretion, it adopted principles sufficient to afford it com-

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People v. *Dunn,* (1889) 80 Cal. 211, 22 Pac. 140, is not clear. Compare *Central of Ga. Ry. Co.* v. *Railroad Comm.,* (1908) 161 Fed. 925, 985, where the court declared unconstitutional a state law in which an attempt was made to confer upon a commission a large amount of discretion as to rates.

[99] See note 85, *supra.* The decision in *Picton* v. *Cass County,* (1904) 13 N. D. 242, 100 N. W. 711, is sound, but the reason given for it is not, unless the fact that the resources of the state were involved constitutes an exceptional circumstance. The same reason had been improperly given in a number of cases cited in that opinion. In *State* v. *Hagood,* (1888) 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841, where a statute provided that licenses to mine within the public domain might be granted or refused by the Board of Agriculture according to its judgment as to the best interests of the state, the court refused the petition of a mining company for a mandamus compelling the board to grant a license; and in *United States* v. *Williams,* (1887) 6 Mont. 379, 12 Pac. 851, where an act of Congress provided that timber growing on the public lands might be cut subject to such regulations as the Secretary of the Interior might prescribe for the protection of the undergrowth "and for other purposes," the court sustained an action for the value of timber cut in violation of law. In each case the court said that legislative power was not delegated to administrative officers. It seems that that reason was unsound, and that the courts should, instead, have said merely that the absence of valid statutes did not warrant the appropriation of public property by individuals.—In several cases, *e. g., People* v. *Grand T. W. Ry. Co.,* (1908) 232 Ill. 292, 298, 83 N. E. 839, 842; *Chicago, B. & Q. R. Co.* v. *Jones,* (1894) 149 Ill. 361, 378, 37 N. E. 247, 251, 24 L. R. A. 141, 145; and see cases there cited and *Wayman* v. *Southard,* (1825) 10 Wheat. 1, 43; the courts have said that a legislature "may authorize others to do those things which it might properly, yet cannot understandingly or advantageously, do itself." Undoubtedly a legislature may delegate to others *some* powers which it might rightfully exercise itself. But the statement, which is worthless as a test of constitutionality, cannot properly mean that where a legislature cannot advantageously enact specific regulations it may empower others to make such regulations without the guidance of legislatively-established principles.

plete guidance and announced those principles as publicly and as formally as laws are announced, it would be clear to most persons that that organ was exercising power which is strictly legislative. And where the reasons for administrative decisions are not announced in advance or where that organ does not decide in advance upon any guiding principles whatever its determinations are fully as legislative in their nature.[100] The fact that no act legislative in character preceded its determinations in specific cases cannot make those determinations valid. The legislature alone has power to change the requirements of the government as to the conduct of individuals; and while the legislature, though it may state its requirements in specific form, need not do so, but may entrust that power to an administrative organ if the legislature itself ordains the principles from which those specific rules may be deduced, an administrative organ would exercise legislative power if it enforced rules which were not based upon principles established by the legislature or if it interfered with the conduct of individuals without the previous establishment of any rule whatever.

Of course, if there were only one degree and character of rate regulation which a legislature might constitutionally ordain, it would be sufficient for the legislature simply to create a commission and empower it to name specific rates. Further directions would be unnecessary. But it is obvious that there are constitutionally possible regulations of

[100] Of course where no uniform rules are adopted the danger of injustice is far greater than where they are adopted. The administrative organ may act not merely at haphazard, but with partiality, and the opportunity to work great injustice through partiality gives to persons who may be unscrupulous a means of keeping themselves in misused power. The danger is a real one. It would be far easier for that organ to act with dishonest motives than it would be to prove such motives so clearly as to warrant a court in restraining the action upon that ground. And if the opportunity to work such injustice might constitutionally be given to an administrative organ, no assumption by the judiciary of an unrestrained veto power—which is not granted to the judiciary by the constitutions—would be sufficient to prevent such an evil.

rates which differ in extent and character. The legislature may seek merely to prevent manifestly extortionate or manifestly discriminatory charges; or it may, within broad constitutional limits, go further and, disregarding the question whether the rates and the relations between rates which have been fixed by the carriers are manifestly improper in themselves, it may command that the rates and the relations between rates be made to conform to principles of public policy laid down by the legislature.[101] And, of course, in deciding upon the policy to be followed and in settling the claims of conflicting interests, there are abundant opportunities for differences of opinion and there are at least several possible solutions of the questions at issue.

[101] As Mr. Victor Morawetz said before the Senate Committee on Interstate Commerce on April 18, 1905, "The expressions 'reasonable rates' and 'unreasonable rates' are often used in very different senses. Thus, when it is said that a rate shall be reasonable, this may mean (1) that the rate shall not be unreasonably high and illegal under the common law and the interstate commerce act, or (2) that the rate shall not be unreasonably low in the sense of being confiscatory, or (3) that the rate shall be the particular rate which, in the opinion of a commission or of some particular person, ought to be established between these two extremes." "There is a wide range between a rate that is unreasonably high, and therefore illegal as against the shipper, and a rate that is so low as to be confiscatory as against the carrier. For example: assuming that a railway company may charge 40 cents a hundred pounds for carrying a given article between two points without making the rate unreasonably high and therefore illegal, it is quite possible that this rate might be reduced by legislative action to, say, 30 cents a hundred pounds without violating any constitutional right of the carrier. In this case the maximum rate which would be reasonable and which could be imposed by the carrier upon the shipper would be 40 cents a hundred pounds, and the minimum rate which could be imposed by the legislature on the railway company would be 30 cents a hundred pounds." As the legislature may prohibit rates which are extortionate and may prescribe rates which are not confiscatory, there is no reason whatever to doubt that the legislature may itself fix rates anywhere between those extremes, and that it may authorize a commission to fix rates at any point between those extremes if the legislature declares what that point shall be.—The opinion in *Trustees* v. *Saratoga G., E. L. & P. Co.*, (1908) 191 N. Y. 123, 83 N. E. 693, 700, does not call for serious consideration. The court apparently overlooked the fact that a legislature may itself name specific rates, and did not realize that the word "reasonable" is used in more than one sense. And in *Interstate C. S. Ry. Co.* v. *Commonwealth*, (1907) 207 U. S. 79, 86, 28 Sup. Ct. 26, 27, Holmes, J., apparently did not give sufficient consideration to the use of the word "reasonable." On that point he spoke only for himself.

For the problems involved in rate regulation are complicated and important. A legislature, in deciding upon principles of regulation, may affect economic conditions within the territory subject to it at least as greatly as they could be affected by any possible changes in the federal tariff.[102] Since, therefore, there is a wide range of possible differences in the extent and character of regulations, it necessarily follows that, unless legislative power may be delegated, when the legislature entrusts to a commission the power of naming specific rates, it must state definitely what principles are to be made effective by that commission.

Some of the courts which have sustained statutes authorizing commissions to name railroad rates have thought, more or less clearly, that in those statutes the legislatures had declared what the law should be and had left to the commissions merely the enforcement of legislation. We

[102] For example, a change in the relation between the rates charged on carload lots and those charged on less than carload lots may cause the building up of a jobbing business or may cause the following of different methods of distribution; a change in the relation between raw and manufactured products, as between grain and flour or live stock and dressed meat, may cause a shifting in the location of a manufacturing industry; a change in the relation between products which can at times be substituted for each other, as between the various kinds of building materials or the various kinds of food stuffs, may seriously affect the producers; and a change in the relation between different termini may cause the decay of one community and the upbuilding of another. A change of rate upon one road may be important mainly because of the change in relation to rates charged by another road which carries products from a competing source of supplies or to a competing market in a different part of the country. Of course, where the rates imposed by the government are merely maximum and not absolute the carrier may be able to allow the relation between the rates actually charged to remain the same. But any change in the relation between rates does affect economic conditions and may affect them seriously.—And even when no question of the relation between rates is involved, a change in rates may have a serious effect upon the producers as well as upon the railroad and upon the consumers. Passing over the more obvious illustrations—a reduction in the rates chargeable may make it necessary for the carrier to reduce its operating expenses, delaying transportation in each case until there accumulates an amount of freight nearer to the maximum hauling capacity of its engines, in that way giving to the large producer or the producer at a large shipping centre an advantage over a competitor who produces less or who is less favorably situated.

have gathered together the cases in which the courts took that position and have shown the provisions of the statutes there involved.[103] But none of those courts realized that important differences in rate regulation are constitutionally possible. Consequently, of course, none of those courts sufficiently considered the question whether in the statute before it the legislature had actually established definite principles for the guidance of the commission in naming specific rates. And for that reason it cannot be said that that question has been finally settled as to any particular statutory provision.

It is possible, in view of the context in some of the statutes, that the term "reasonable rates" is used to denote rates which mark the border beyond which charges by the carrier would be extortionate, and while there may be some doubt as to just what would constitute an extortionate charge, it seems that a grant of power to name such rates would not be so indefinite as to be unconstitutional. But the statutes do not appear to use the word "reasonable" in any other sense which is so definite that, if interpreted in that way, a grant of power to name "reasonable rates" would be constitutional. It is true that some courts have, by way of false analogy, applied the term "reasonable" to rates which were not so low as to be confiscatory; yet we cannot say that the statutes in empowering the naming of "reasonable rates" intended to direct that the rates should be made as low as would be constitutional. And no one who is acquainted with railroad transportation would assert that, on principle, between the extremes of extortion and confiscation there can be only one rate which is justifiable.[104]

While, however, a grant of the power to name "reason-

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[103] See note 33, *supra.*

[104] As Mr. Victor Morawetz said before the Senate Committee on Interstate Commerce on April 18, 1905, "It is rarely, if ever, true that there is but one just and reasonable rate for the transportation of a given article between two points. In nearly every instance there is a wide range within which any rate would be just and reasonable."

able rates" is constitutional if that term is used by the legislature to enunciate a definite principle in accordance with which the commission must act, yet when that term is inextricably bound up with other terms which are indefinite the entire clause seems to be unconstitutional. This is true in the case of the Interstate Commerce Act. And we have there not only the language of the statute itself but also the interpretation which the commission has placed upon such language to show that Congress has attempted to confer upon the commission a discretion which is so broad that the provision cannot be upheld upon any ground which is not flatly inconsistent with the rule that legislative power may not be delegated.

We have, for instance, the statement of the commission itself that "every case before the commission, however trivial it may appear, involves in its disposition the formulation of principles under the law which have important bearing upon the business of carriers and the commerce, not only of the immediate locality, but often of the entire country." [105] And while Congress may not have realized

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[105] Sixth Annual Report, (1892) p. 12. This statement was repeated in its Seventh Annual Report, (1893) p. 13, the commission also saying that "what may sometimes appear to be unnecessary delay in the disposition of matters before the commission is really the taking of time to consider the effect of a ruling upon the whole situation and beyond that which might be just as between only the parties to the record." And in its Ninth Annual Report, (1895) p. 59. the commission said, "To some extent the principles upon which taxation rests must be allowed in fixing a just rate; to some extent the result of the rate upon the development of industries must be taken into the account in all decisions which the commission is called upon to make; to some extent every question of transportation involves moral and social considerations, so that a just rate cannot be determined independently of the theory of social progress." See also Fourth Annual Report, (1890) p. 6; *Texas & P. Ry. Co.* v. *Interstate Com. Comn.*, (1896) 162 U. S. 197, 234, 16 Sup. Ct. 666, 681. Commissioner Prouty said in the American Monthly Review of Reviews for May, 1906, p. 595, "Now the fixing of a railway rate is in its nature legislative rather than judicial. There is no standard by which it can be determined. . . . In determining the justice or reasonableness of a particular rate all these factors, and many others, may present themselves for consideration. They are properly taken into account by the traffic official who fixes the rate in the first instance, and they must be considered by the administrative body which revises that rate. It is finally a question of judgment what,

the indefiniteness of its grant of power, it is true that a consistent application of the law involves the formulation of important principles which may affect fourteen billion dollars' worth of railroad property; which may affect one and a half million workmen and their families who are directly dependent upon railroad earnings; and which may affect seriously every industry and every section of the country. And it involves the formulation of those principles by an administrative body and not by Congress.

Of course, the executive department seeks such grants of power. A President who suspended the enforcement of important laws, and who even turned into a forest reserve millions of acres of land which Congress had expressly directed him to throw open to public settlement,[106] does not hesitate to ask for broad grants of discretion. The power which he secured for the Interstate Commerce Commission is no greater than that which he tried to secure for his Commissioner of Corporations, a power which in the hands of an aggressive person might prove very useful during political campaigns—especially in the absence of a law requiring the publication of the receipts of campaign committees—and perhaps at other times. And that power might constitutionally be granted to the Commissioner of Corpo-

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taking everything into account, ought fairly to be done." In the same article he declared, p. 596, "It exercises precisely the same administrative function in correcting as does the traffic official in establishing" rates, with the qualification that the commission considers more than the interests of the carrier. In connection with that declaration should be read his statement in the same magazine for July, 1906, p. 65, "The making of a railway rate rests in the judgment of the traffic official. Within very wide limits that official could not demonstrate by any legal standard and legal evidence that his rate was right; neither could the shipper demonstrate by the same methods that it was wrong."

[106] Other illustrations of executive usurpation are given in Pierce, Federal Usurpation, p. 107 *et seq.* And see also pages 190, 280, 281, 283, 304, 355, of that book. It is said that the President also established an extensive code of laws for the Canal Zone without authority from Congress: see Congressional Record for May 26, 1908, p. 7290. And the recent unauthorized issue of bonds by his Secretary of the Treasury is well known.

rations if the grant of power to the Interstate Commerce Commission is constitutional.

Indeed, if the legislature may constitutionally grant a broad discretion to a railroad commission, where must it stop? May not Congress delegate to a commission similar power over the tariff or over taxation in general? May not the state legislatures delegate to commissions similar power over the criminal laws? May not the power which is granted to seven men or five or three be granted to one man,[107] and not upon one subject only, but upon every subject which now comes before the legislatures?[108]

Robert P. Reeder.

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[107] Indeed, the President can now control the decisions of the Interstate Commerce Commission, for its members are removable at his pleasure: see section 11 of the Act.

[108] As was said by Mr. E. B. Whitney in 31 Am. L. Reg. 186, "Many cases could be put in which the ruling party could, for a considerable time, perpetuate its power in a situation like that of the second session of the Fifty-first Congress. President, Senate and House of Representatives then belonged to the same political party, and had it in their power to make the laws. They knew that on the fourth day of March then next ensuing the opposition would obtain control of one branch of Congress, so that for two years party legislation would be impossible. If a Congress has an unlimited right of delegation, a series of acts could easily, and might in the future, perhaps, not improbably, be passed, which should secure to the President the right of legislation during those two years, while the ensuing Congress would simply and easily, by the ordinary parliamentary processes, be stifled in a deadlock. Thus the power to delegate involves the power to create a limited dictatorship."